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SUPREME COURT OF THE UNITED STATES

No. 72

APPELLANT'S BRIEF

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SUPREME COURT OF THE UNITED STATES

No. 72

OCTOBER TERM, 1930

—o—

B. K. ISAACS, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF HENRIETTA E. CUNNINGHAM, BANKRUPT, *Appellant,*

vs.

HOBBS TIE & TIMBER COMPANY, *Appellee.*

—o—

(Not Reported Below)

—o—

Appealed From the District Court of the United States, for the Western District of Arkansas, to the Circuit Court of Appeals for the Eighth Circuit, From Which a Certified Question Was Submitted and on Motion the Entire Record and Cause Was Certified to This Court.

—o—

APPELLANT'S BRIEF

—o—

STATEMENT OF GROUNDS OF JURISDICTION

This cause was instituted by the Hobbs Tie and Timber Company in the Chancery Court of Benton County, Arkansas, on December 12, 1928 (R. 6) against the Appellant and others, to establish a debt and foreclose a mortgage lien on property in the Western District of Arkansas (R. 12).

The Appellant removed the cause to the District

STATEMENT OF THE CASE

As the cause proceeded to judgment upon the pleadings of the Appellee, and the answer of the Appellant (R. 29) the facts revealed by the pleadings will be stated in chronological order.

J. L. Cunningham executed and delivered to the Holland Banking Company of Springfield, Missouri, a note for $79,000.00, dated September 27, 1921, due October 1, 1924, bearing interest from date at the rate of 7% per annum (R. 11) and to secure the

Constructive service of process was caused to be made in accordance with the practice of the state (R. 15-16), and on the return day of the process (R. 19) Appellant, after notice (R. 17) filed his petition and bond for removal (R. 18-19) of the cause to the District Court of the United States for the Western District of Arkansas (R. 19), where he duly answered (R. 20).

It is disclosed by Appellant's answer that before this suit was filed and on September 14, 1928—more than two and one-half months before it was insti-

the owner of the note, the property was listed as an asset of the bankrupt estate in schedules filed August 21, 1925, and upon his appointment and qualification as aforesaid, the defendant entered into possession of said premises and since that time and at the present time he has been in lawful and peaceable possession thereof as Trustee in Bankruptcy aforesaid."

The estates of the bankrupts are insolvent, the indebtedness thereof exceeding $350,000.00, and assets being worth more than 50% of the debts.

The Appellant had not been able, at the time of his answer, to definitely ascertain the value of the mortgaged property, but alleged that there were in excess of 25,000,000 feet of uncut hardwood timber thereon; that the reasonable value of the property is in excess of $125,000.00, so that there is an equity for the benefit of the general creditors therein of more than $50,000.00.

That neither the Court of Bankruptcy, nor the Appellant had consented to the foreclosure of the mortgage by Appellee; that if the mortgage is foreclosed, and the property sold otherwise than in due course of administration by the Court of Bankruptcy, it will result in great loss to the general creditors; that the Bankruptcy Court has exclusive jurisdiction to administer the property; that a foreclosure sale would seriously impede and embarrass the orderly administration of the estate. That in the short time intervening since his appointment, Appellant had not been able to ascertain all the necessary facts in reference to the land in order to enable him to properly ad-

minister upon the same; that it is advisable and to the best interest of the estate that the defendant be given time and opportunity to dispose of the property at private sale in due course of administration of the Bankrupt Estate, after he has obtained knowledge of the property; that the Appellee has for a long time endeavored to acquire said property, and that under the conditions a foreclosure sale would result in a sacrifice of the property for not more than the amount of the indebtedness due on the mortgage, and that Appellee would undoubtedly be the sole bidder.

That the property, being in the custody of the Bankruptcy Court, the District Court had no jurisdiction to administer upon the same. The prayer of the answer was that the Court proceed no further with the suit than to fix the claims and liens of the various parties against the property, and that the sale be denied.

This answer was filed February 11, 1929, and it is apparent that at that time it was impossible to know whether or not the other defendants in the case would appear, so that the cause would proceed in personam.

An amendment to the answer was allowed (R.) in which it was alleged, and by force of the motion to strike the answer, admitted, that Appellant had been authorized and directed to sell the property in question, by an order of the Referee in Bankruptcy entered September 14, 1928.

A decree was entered (R. 29 to 40) sustaining the motion to strike the answer and rendering judgment in favor of Appellee on the pleadings, establishing

the amount due on the note in the sum of $66,020.65, foreclosing the mortgage lien and ordering a sale of the property by a Special Master. Appellant excfepted to the decree (R. 30), and thereafter petitioned for appeal (R. 40). He also prayed that the appeal be allowed without requiring him to furnish bond, and that the sale be stayed, pending the appeal. The appeal was allowed, but the stay denied (R. 40). At the time of filing petition for appeal, assignment of errors was filed, and with permission of the Court, at the time the appeal was allowed and the stay denied, an additional assignment was filed, challenging the refusal of the Court to stay the enforcement of the decree pending the appeal (R. 42).

Neither the District Court nor the Circuit Court of Appeals expressed an opinion on the points involved.

SPECIFICATION OF ERRORS

The assigned errors are as follows:

1. The court erred in sustaining the motion of the plaintiff to strike out and dismiss the answer of this defendant, and in thereupon entering judgment on the pleadings.

2. The court erred in ordering and decreeing the foreclosure and sale of the property in controversy herein.

3. The court erred in refusing to allow his appeal herein without bond for damages being furnished as required of other appellants in ordinary cases, in

order to supersede the operation and enforcement of the decree appealed from.

SUMMARY OF ARGUMENT

The Appellant as Trustee in Bankruptcy, under appointment of the District Court of the United States of the Northern District of Texas, was in actual possession of the property situated in Arkansas upon which Appellee sought to foreclose his mortgage at the time this suit was instituted. The possession of the Trustee is the possession of the court, and such property was therefore in the custody of the bankruptcy court.

Acme Harvester Co. v. Beekman Lbr. Co., 222 U. S. 300.
Robertson v. Howard, 229 U. S. 254.
U. S. F. & Co. v. Bray, 225 U. S. 205.
Lazarus v. Prentice, 234 U. S. 263.
Knauth Etc. v. Latham & Co., 242 U. S. 426.

Under such circumstances the District Court of the United States for the Western District of Arkansas had no jurisdiction to entertain an action to foreclose a mortgage on said property without the consent of the bankruptcy court; its decree establishing Appellee's claim against the property and ordering a sale thereof is void and a nullity.

Wiswall v. Sampson, 14 Howard 52.
Heidritter v. Elizabeth Oil Cloth Co., 112 U. S. 295.

Byers v. McAuley, 149 U. S. 608.
Wabash R. R. v. Adelbert College, 208 U. S. 38.
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Taubel, etc. Co. v. Fox, 264 U. S. 427.
Hobbs v. Head, etc. Co., 231 U. S. 692.
Metcalf v. Barker, 187 U. S. 165.
Lehman v. Gumble, 236 U. S. 448.
Davis v. Friedlander, 104 U. S. 570.
Watts v. Sachs, 190 U. S. 1.

Under 11 U. S. C. A. Sec. 48b providing that trustees shall not be required to give bonds when they take appeals or sue out writs of error, the Trustee is not required to give a supersedeas bond in order to stay enforcement of a decree appealed from, especially in a foreclosure case such as this, because a trustee cannot bind an estate in bankruptcy for the payment of any obligation, and the estate cannot be held liable for any obligation or claim, except such as are authorized by law. The Trustee should be treated as operating under the judicial department of the government, within the meaning of 28 U. S. C. A. Sections 869-870. So that, when he has appealed from an adverse decision in any case, the court rendering the same must be held to be without power to enforce its decree pending appeal, and any action taken to enforce the same pending the appeal, is void.

ARGUMENT

The points presented for determination are:

1. *As the Court of Bankruptcy was in possession and had custody of the property in question through its Trustee, prior to the institution of this suit, the District Court was without power, in the absence of consent thereto by the former court, to order a foreclosure and sale of the property.*

2. *As Trustees in Bankruptcy are not required to give bond when they take appeals, the District Court erred in refusing to stay the sale of the property under its decree pending this appeal.*

On the First Point

The Appellant in this case was admittedly in possession of the property in question at the time this suit was instituted in the Chancery Court of Benton County, Arkansas, and had been in possession thereof for sometime prior thereto. The admitted facts in respect to his possession are that he is trustee in bankruptcy of Henrietta E. Cunningham, and the property was listed as belonging to her in schedules filed in the bankruptcy proceeding in the Northren District of Texas in August, 1928. The property was conveyed to him by T. P. Perkins, who held the legal title to the property and possession thereof for the bankrupt, in October, 1928. The bankruptcy court had authorized and directed Appellant to sell the property, either subject to or free of liens, as might be advisable, and

it is admitted that at all times since the adjudication in bankruptcy in the Northern District of Texas, he had been in actual and peaceable possession of said property as Receiver and Trustee in Bankruptcy, under appointment of the District Court for the Northern District of Texas. These were the conditions existing in respect to the property at the time Appellee instituted this suit in the Chancery Court of Benton County, Arkansas, against Appellant and others on December 12, 1928, to establish his claim against the land, evidenced by the note which had been executed by J. L. Cunningham, deceased, and secured by a mortgage given on the property many years prior to the time Appellee acquired the note—five days before the suit was filed.

It is perfectly clear that if the possession of Appellant was the possession of the Court of Bankruptcy appointing him, the decree of the District Court and all acts under it, are nullities; for, if the District Court of the United States for the Northern District of Texas had possession and custody of the land in question, at the time this suit was brought, it was thereby effectively and conclusively withdrawn from the jurisdiction of every other court during the time the Bankruptcy Court retained jurisdiction of it. That his possession is that of the District Court for the Northern District of Texas, has been decided here many times.

On the whole, it is certain that the primary object of the Bankruptcy Act is to draw to the custody and

control of the Court of Bankruptcy in which proceedings are begun, all property of the bankrupt, wheresoever it may be situated, for the purpose of being reduced to money and distributed among his creditors.

In *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, bankruptcy proceedings were pending against the Acme Harvester Company in the Northern District of Illinois, when a suit was filed in Missouri to recover on a debt. An attachment was issued in the suit and levied upon money owing the bankrupt. In speaking of the effect of the bankruptcy proceeding on the attempt to thus attach property of the bankrupt, this Court in the course of its opinion, said:

> "Whatever may be the limitations of the doctrine declared by this court, speaking by the late Chief Justice Fuller in Mueller v. Nugent, 184 U. S. 1, where it is said, 'it is as true of the present law as it was of that of 1867, that the filing of the petition is caveat to all the world, and, in effect an attachment and injunction. International Bank v. Sherman, 101 U. S. 403, and on adjudication, title to the bankrupt's property became vested in the Trustee (Secs. 70, 21E —11 U. S. C. A. 110, 44E), with actual or constructive possession and placed in the custody of the Bankruptcy Court'—it is none the less certain that an attachment of the bankrupt's property, after the filing of the petition and before adjudication cannot operate to remove the bankrupt's estate from the jurisdiction of the Bank-

ruptcy Court for the purpose of administration under the Act of Congress.

"It is the purpose of the bankruptcy law, passed in pursuance of the power of Congress, to establish a uniform system of bankruptcy throughout the United States, to place the property of the bankrupt under the control of the court, wherever it is found, with a view to its equal distribution among the creditors. The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded as in custodia legis from the filing of the petition. It is true that under Sec. 70a of the act of 1898 the trustee of the estate, on his appointment and qualification, is vested by operation of law with the title of the bankrupt as of the date he was adjudicated a bankrupt; but there are many provisions of the law which show its purpose to hold the property of the bankrupt intact from the time of the filing of the petition, in order that it may be administered under the law if an adjudication in bankruptcy shall follow the beginning of the proceedings. Paragraph 5, Sec. 70a, in reciting the property which vests in the trustee, says there shall vest 'property which, prior to the filing of the petition (the bankrupt) * * * could by any means have transferred or which might have been levied upon and sold under judicial process against * * * (the bankrupt).' Under Sec. 67c attachments within four months before the filing of the petition are dissolved by the adjudication in the event of the insolvency of the bankrupt, if their enforcement would work a preference. Pro-

vision is made for the prompt taking possession of the bankrupt's property, before adjudication, if necessary (Sec. 69a). Every person is forbidden to receive any property after the filing of the petition, with intent to defeat the purposes of the act. These provisions, and others might be recited, show the policy and purpose of the bankruptcy act to hold the estate in the custody of the court for the benefit of creditors after the filing of the petition and until the quetsion of adjudication is determined. To permit creditors to attach the bankrupt's property between the filing of the petition and the time of adjudication would be to encourage a race of diligence to defeat the purposes of the act and prevent the equal distribution of the estate among all creditors of the same class, which is the policy of the law. The filing of the petition asserts the jurisdiction of the Federal court, the issuing of its process brings the defendant into court, the selection of the trustee is to follow upon the adjudication, and thereupon the estate belonging to the bankrupt, held by him or for him, vests in the trustee. Pending the proceedings the law holds the property to abide the decision of the court upon the question of adjudication as effectively as if an attachment had been issued, and prevents creditors from defeating the purposes of the law by bringing separate attachment suits, which would virtually amount to preferences in favor of such creditors. See in this connection the well-considered cases of State Bank v. Cox, 74 C. C. A. 285, 143 Fed. 91 (C. C. A. Seventh C); Shawnee County v. Hurley (C. C. A. Eighth C), 90 C. C. A. 362, 169 Fed. 92, 94.

"It follows that, if the bankruptcy proceedings were pending, so that the bankruptcy court ac-

quired jurisdiction over the estate, it was error for the state court to proceed to a judgment and appropriation of the property on the attachment suit of a single creditor."

In *Robertson v. Howard*, 229 U. S. 254, there was drawn in question the power of the bankruptcy court to sell property situated beyond its territorial limits. The bankruptcy proceeding was pending in Illinois, and the land was in Kansas. The Supreme Court of Kansas had held that the sale by the trustee was void. This Court said:

"This, however, but amounts to holding that a court of bankruptcy is confined in the administration of the property of a bankrupt to state or district boundaries, and that whenever the bankrupt has property within two or more states, it is necessary to commence independent or ancillary proceedings in all such states in order to subject the property therein to administration and sale. But we think it is clear that this view is incompatible with the bankrupt act of 1898. (30 Stat. at L. 544, Chap. 541, U. S. Comp. Stat. 1901, p. 3418.) No analysis of the text of the act, we think, is necessary to demonstrate this result, since it is elementary and has been decided over and over again that the effect of the adjudication in bankruptcy is to transfer the title of the property of the bankrupt and vest the same in the trustee, who has the right, under the control and authority of the court to administer the same.

"No limitation on this general principle arises from the mere fact of the particular situation of the property, as the principle is general and em-

braces all the property of the bankrupt estate, wherever situated. Indeed, this view was accepted by the court below and made the basis of its ruling, since, in considering whether the quit-claim deed was valid, it held it to be void because the title to the property which it embraced remained in the trustee in bankruptcy—a view which necessarily demonstrates that the ruling as to the invalidity of the sale made in the bankruptcy proceedings rested upon the conception that although the property passed to the trustee and was subject to administration, nevertheless the court was without power to direct the sale of the property, because it was located in another state. But, in discussing the jurisdiction vested in a court of bankruptcy, in United States Fidelity & G. Co. v. Bray, 225 U. S. 205, 217, it was said:

" 'We think it is a necessary conclusion from these and other provisions of the act, that the jurisdiction of the bankruptcy courts in all "proceedings in bankruptcy" is intended to be exclusive of all other courts, and that such proceedings include, among others, all matters of administration, such as the allowance, rejection, and reconsideration of claims, the reduction of the estates to money, and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist them.'

"The court of bankruptcy in Illinois therefore acquired full jurisdiction over the land in question upon the filing of the petition in bankruptcy. Having such jurisdiction, it possessed the power

to order a sale of the certificates or of the interest in the land evidenced by them. The legal title to the certificates being in the trustee, and he being within the jurisdiction of the court, and subject to its orders, that tribunal could lawfully exert its powers over him, without regard to where the land was situated. Even if the enlarged powers of a court of bankruptcy over the estate under its control be put out of view, and the subject be looked at as a mere question of equitable jurisdiction, it may not be doubted that a court of equity in one state in a proper case could compel a defendant before it to convey property situated in another state. Fall v. Eastin, 215 U. S. 1, and cases cited. There being thus ample power in the court, it follows, of course, that resort to ancillary proceedings was unnecessary. The decision in Babbitt v. Dutcher, 216 U. S. 103, to the effect that district courts other than the court in which original proceedings in bankruptcy are instituted possess power in proper cases to exert ancillary jurisdiction in aid of the court in which the bankruptcy proceedings are pending lends no support to the contention that the court which had full power could not exert its ample authority without invoking the ancillary power of another and different court."

The language above quoted from the opinion in *United States Fidelity & Guaranty Co. v. Bray*, 225 U. S. 205, was employed in a case in which the bankruptcy proceeding was pending in the district court, when an equity suit seeking to control the administration of the fund in the possession of the trustee in bankruptcy, was instituted in the circuit court for the

same district. In that case it was contended on behalf of the plaintiffs that the rights of the parties in the fund should be fixed and apportioned by the court; that a lien be declared thereon; that no claims of the Trustee be allowed against the same, and that the Trustee be directed to pay the money in accordance with the decree, and be enjoined from taking any other action in the matter. The court of bankruptcy prior to the institution of the suit granted leave to the plaintiffs in the suit to bring the same in the Circuit Court. The Trustee, however, challenged the jurisdiction of the Circuit Court, and in holding that the challenge to the jurisdiction was well taken, the Supreme Court says:

> "An examination of the bill discloses that its primary purpose is to obtain an adjudication of certain claims presented against the estate of the bankrupt, now in the course of administration in the bankruptcy court, and of the priority to be accorded to them in the distribution of a fund belonging to the estate and now in the control of that court. That this fund arose in the due administration of the estate, is lawfully in the custody of the bankruptcy court, and is awaiting distribution among such of the creditors as are entitled to participate therein, is a necessary conclusion from the allegations of the bill, and is conceded. The complainant does not assert a title to it, but at most only an equitable right to have it applied to just claims for labor and materials, for which the complainant is liable as the bankrupt's surety under the act of August 13, 1894, supra. The real controversy is over the merits of some of those claims, the right of the present

holders to assert them for their full amount, and the priority to be accorded them in the distribution. By an intervening petition in the bankruptcy proceeding the complainant voluntarily submitted its asserted equitable right to the court of bankruptcy for determination, and the matter is now pending before the referee. But by the present plenary bill in equity it is sought to take from the bankruptcy court the adjudication of the claims in question and the decision of what priority shall be accorded them. The circuit of appeals holds that this cannot be done consistently with the bankruptcy act, and the correctness of its holding is the principal question presented by this appeal.

"We are not here concerned with a suit by a trustee to recover property in the possession of another who claims it adversely, nor with a suit against a trustee to recover property in his possession, claimed by another, and therefore the jurisdictional questions incident to suits of that character need not be considered. But we are concerned with a suit against a trustee, the purpose of which is to control the distribution of a fund in his possession, admittedly belonging to the bankrupt's estate, and to determine to what extent and in what order the several creditors shall participate therein.

"Section 2 of the bankruptcy act invests courts of bankruptcy 'with such jurisdiction *at law and in equity* as will enable them to exercise original jurisdiction in *bankruptcy proceedings*, * * * to * * *

(2) " 'Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; * * *

(6) "'Bring in and substitute additional persons or parties in *proceedings in bankruptcy* when necessity for the complete determination of a matter in controversy;

(7) "'Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; * * *

(13) "'Enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment; * * *

(15) "'Make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act.' (30 Stat. at L. 545, chap. 541, U. S. Comp. Stat. Supp. 1911, p. 1491.)

"And the section concludes by saying: 'Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.'

"Section 23a provides: 'The United States circuit courts shall have jurisdiction of all controversies at law and in equity, *as distinguished from proceedings in bankruptcy*, between trustees as such and *adverse claimants*, concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings has not been instituted, and such controversies had been between the bankrupts and such adverse claimants.'

"And Par. 57k reads: 'Claims which have been allowed may be reconsidered for cause, and re-

allowed or rejected in whole or in part, according to the equities of the case, before, but not after, the estate has been closed.'

"WE THINK IT IS A NECESSARY CONCLUSION FROM THESE AND OTHER PROVISIONS OF THE ACT THAT THE JURISDICTION OF THE BANKRUPTCY COURTS IN ALL 'PROCEEDINGS IN BANKRUPTCY' IS INTENDED TO BE EXCLUSIVE OF ALL OTHER COURTS, AND THAT SUCH PROCEEDINGS INCLUDE, AMONG OTHERS, ALL MATTERS OF ADMINISTRATION, SUCH AS THE ALLOWANCE, REJECTION, AND RECONSIDERATION OF CLAIMS (THE REDUCTION OF THE ESTATES TO MONEY, AND ITS DISTRIBUTION, THE DETERMINATION OF THE PREFERENCES AND PRIORITIES TO BE ACCORDED TO CLAIMS PRESENTED FOR ALLOWANCE AND PAYMENTS IN REGULAR COURSE, AND THE SUPERVISION AND CONTROL OF THE TRUSTEES AND OTHERS WHO ARE EMPLOYED TO ASSIST THEM.

"The allegations of the bill, other than those relating to the actions brought against the complainant in Pennsylvania, and to its contingent claim against the indemnitor banks, are intended to invoke (1) a reconsideration and modification of the referee's order of November 19, 1904, allowing certain claims as preferred claims for labor and materials, (2) a determination of the right of the present holders of those claims to have them rated and paid at their face value, (3) an inquiry into the charge that the trustee and others who were employed to assist him in the management of the estate have been speculating

in claims against it, and procuring or acquiescing in their improper allowance and classification, and (4) a direction that the just claims for labor and materials be accorded a preference in the distribution. These matters are rightly subjects for proceedings in bankruptcy, and therefore fall within the exclusive jurisdiction of the court of bankruptcy. A distinct purpose of the bankruptcy act is to subject the administration of the estate of bankrupts to the control of tribunals clothed with authority and charged with the duty of proceeding to final settlement and distribution in a summary way, as are the courts of bankruptcy. Creditors are entitled to have this authority exercised, and justly may complain when, as here, an important part of the administration is sought to be effected through the slower and less appropriate processes of a plenary suit in equity in another court, involving collateral and extraneous matters with which they have no concern, such as the controversy between the complainant and the indemnitor banks.

" 'Of the fact that the suit was begun in the circuit court with the express leave of the court of bankruptcy it suffices to say that the latter was not at liberty to surrender the exclusive control over matters of administration, or to confide them to another tribunal."

In *Lazarus v. Prentice*, 234 U. S. 263, bankruptcy proceedings were instituted in New York, and an ancillary proceeding was shortly thereafter instituted in the Federal Court in Louisiana, where a temporary receiver was appointed to take charge of the assets in that state. It was held that the filing of the bankruptcy petition brought the property of

the bankrupt wherever situated into custodia legis, and it was thus held from the date of the filing of the petition, so that subsequent liens could not be given or obtained thereon, nor proceedings had in other courts to reach the property, the court of original jurisdiction having acquired the full right to administer the estate under the bankruptcy law. It was also held that any attempt to secure a right in the property by subsequent proceedings or assignments was a mere nullity, properly disregarded by the bankruptcy Court. It was also held that any claim to the property in question must be asserted in the court of original jurisdiction, and could not be adjudicated by intervention in the ancillary proceeding.

In *Knauth, etc., v. Latham & Company*, 242 U. S. 426, an attempt had been made by way of cross-action in a suit by a Receiver in Bankruptcy to impress a trust upon certain property involved in the case. It being apparent that the cross-bill was an attempt to obtain priority of payment on account of money fraudulently obtained by the bankrupt, and put into their business, it was held that the Federal Court for the Southern District of Alabama could not entertain the cross-bill because the estate of the bankrupt was being administered in the Federal Court for the Northern District of Alabama. The same ruling was made in two companion cases reported with the principal case.

To achieve the foregoing object, it is apparent that state lines and district boundaries are eliminated. The

title and possession of a trustee in bankruptcy of property not adversely claimed, is that of the court whose officer he is.

Mueller v. Nugent, 184 U. S. 1.
Whitney v. Wenman, 198 U. S. 539.

In the former case, the court said:

> "On adjudication, title to the bankrupt's property became invested in the trustee with actual or constructive possession, and placed in the custody of the bankruptcy court."

So that in matters of administration, jurisdiction of the court of bankruptcy of property of the bankrupt in possession of the trustee is paramount and exclusive.

Knauth, etc., v. Latham & Co., 242 U. S. 426.
U. S. F. & G. Co. v. Bray, 225 U. S. 205.
Lazarus v. Prentice, 234 U. S. 263.

The general rules applicable alike to all courts which have custody of property or a fund, are applicable.

Dayton v. Stanard, 241 U. S. 588.
Murphy v. Hofman, 211 U. S. 562.

In the latter case, above cited, this Court said:

> "But where the property in dispute is in the actual possession of the court of bankruptcy, there comes into play another principle not peculiar to courts of bankruptcy, but applicable to all courts, Federal or state."

It is true the bankruptcy courts have jurisdiction only within their territorial limits, but as we have seen, this is no obstacle to the administration of the estate under the Act, by the court in which the primary proceedings are pending, where property belonging to the estate is situated within the territorial limits of another court of bankruptcy. All such property is in the custody of the primary court of bankruptcy for the purposes of administration. (See the authorities hereinbefore cited.) That court alone, may determine liens and claims against the same or permit such to be determined elsewhere, and it, alone, may determine when and under what conditions such property may be sold by its trustee. The trustee cannot surrender possession of any property in his possession to any other court, without the consent of the court that appointed him, for his possession is that of the Court.

In *Whitney v. Weinman*, 198 U. S. 539, the Court said:

> "It is insisted that in the present case as the property was voluntarily turned over by the receiver, thereby the jurisdiction of the district court, upon the ground herein stated, is defeated as the property is no longer in the possession or subject to the control of the court. But the receiver had no power or authority under the allegations of this bill to turn over the property. * * * the court had possession of the property and jurisdiction to hear and determine the interests of those claiming a lien thereon or ownership thereof. We do not think this jurisdiction can be ousted by a surrender of the property

by a receiver and without the authority of the Court."

Even the court in which proceedings in bankruptcy are pending, cannot grant authority to another court to conduct proceedings in bankruptcy in respect to property in its custory.

U. S. F. & G. Co. v. Bray, 225 U. S. 205.

There is no question but that if the property involved here was situated in the Northern District of Texas, proceedings taken by Appellee, without consent of the bankruptcy court of that district, to foreclose its mortgage would be void. (See the authorities cited on pages 46-53 and 96-99 hereof.)

There is nothing in the Bankruptcy Act that implies that the custody of the bankruptcy court of property out of the district in which the proceedings are pending, is of any different degree or character than that which it has of property in the district, in so far as the administration thereof, under the Act, is concerned.

Lazarus v. Prentice, supra.
Knauth v. Latham & Co., supra.
U. S. F. & G. Co. v. Bray, supra.

It would, indeed, be a anamolous situation if the undoubted jurisdiction and power of the primary court of bankruptcy to administer on property of a bankrupt, wheresoever situated, was so limited in its nature and scope that it could not at the same time examine and ascertain the nature and extent of liens and claims against the same, and to sell it either sub-

ject to or free of such claims as it found existed, as fully to all intents and purposes as though the property were in the district. The court in which the proceedings in bankruptcy are pending, is not compelled to resort to ancillary proceedings in order to sell property situated in another state.

Robertson v. Howard, 229 U. S. 254.

The ancillary jurisdiction of courts of bankruptcy within their territory limits to "aid" a receiver or trustee appointed in a proceeding in another court of bankruptcy (11 U. S. C. A. Sec. 11, Subd. 20), extends only to the giving of such "aid" as will render effective the aforesaid objects of the Act. It is not for such courts, in the exercise of this ancillary jurisdiction to act in opposition to the jurisdiction or authority of the court in which the proceedings in bankruptcy are pending. They have no power in proceedings brought by a trustee for the purpose of securing aid in obtaining or maintaining possession, to entertain any proceedings by cross action, or otherwise, that seeks to control the administration of such property by the court in which such proceedings are pending. Re Patterson Lbr. Co., 247 Fed. 578, per Sanford, District Judge. See infra, p. 94.

In *Knauth v. Latham*, supra, in which an attempt was made to impress a lien on property of the bankrupt being administered in another district, by way of cross action in a suit brought by the trustee to recover the property, this Court said:

> "Manifestly such a proceeding could not be entertained in the Southern District of Alabama.

The estate was being administered in another court."

Lazarus v. Prentice, supra, pp. 22-23.

As the district court proceeded to order a sale of the property in question by a special master, and in allowing this appeal refused to stay proceedings for the sale pending the final disposition of the appeal; and, as the Circuit Court of Appeals, likewise, refused to stay the sale, except on condition that Appellant file a bond binding the bankrupt estate absolutely to pay interest accumulating on the debt during the pendency of the appeal, which bond Appellant did not file, it may be assumed that the district court proceeded to carry out its decree. In such event, in fact, in any event, it is of vital importance and indispensable to the disposition of the cause that the legal effect of the decree and sale be determined. If the decree of the district court is simply erroneous, the Appellant is left in a rather embarrassing position, but if it is an absolute nullity, as we contend, then the sale under the decree, passed no title to the purchaser, and the property remains in the custody of the Trustee.

The earliest case in this Court in which the nature of the jurisdiction of the court of bankruptcy was mentioned, arose under the Bankruptcy Act of 1841, in *Ex Parte The City National Bank of New Orleans*, 3 Howard 292. In that case an application was made to this Court on behalf of the Bank against the District Court of the United States for the District of Louisiana, to prohibit it from proceeding to hear a

complaint made against the bank by a Trustee in Bankruptcy. After bankruptcy the bank had proceeded in the state courts without the consent of the Bankruptcy Court, to foreclose a mortgage on certain property of the Bankrupt. The Trustee contended the Bankruptcy Court had exclusive jurisdiction, and, in an opinion by Mr. Justice Story, his contention was sustained. The provision of the Act of 1841, saving liens, mortgages and other securities from impairment by the Bankruptcy proceedings, was construed, and it was held that this provision did not, and could not interfere with the jurisdiction and right of the District Court in which the Bankruptcy proceeding was pending, to inquire into and ascertain the validity and extent of such liens, mortgages and other securities, and to grant to the same remedial justice as the state courts might or ought to grant.

On the other hand, under the same Act, the Court held, in *Nugent v. Boyd*, 3 Howard 426, that where a suit to foreclose a mortgage was instituted prior to the filing of the Bankruptcy proceeding, the state court had authority to proceed to final judgment and to sell the property independent and without the consent of the Court of Bankruptcy.

The power of the Courts of Bankruptcy to decree a sale of mortgaged property of the Bankrupt, either subject to or free of liens, and to apportion the proceeds, if there were more than one mortgage or lien, was first sustained in *Houston, et al., v. The City Bank of New Orleans*, 6 Howard 486.

In *Peck v. Jenness*, 7 Howard 612, which arose

under the Bankruptcy Act of 1841, prior to bankruptcy an attachment was levied on certain property of the Bankrupt in an action in a state court. Under the Bankruptcy Act of 1841, the attachment was not avoided by virtue of the bankruptcy proceedings, but the Court of Bankruptcy, on petition of its assignee, held the attachment to be void. This Court held that the order of the district court was beyond its powers, saying:

> "It is a doctrine of law too long established to require a citation of authorities, that where a court has jurisdiction it has a right to decide every question which occurs in the cause, whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court * * * Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice."

In *Wiswall v. Sampson*, 14 Howard 52, a leading case, this Court held that where lands were in the custody of a receiver, appointed in a state court, they could not be sold by a marshal of the United States under process issued out of the United States Court, although the judgment upon which the process issued was a lien upon the lands, and the execution was levied before the receiver obtained actual possession of the property. It appeared, however, that application for the appointment of the receiver was made before the levy by the marshal. The Court said:

> "It has been argued, that a sale of the prem-

ises on execution and purchase, occasioned no interference with the possession of the receiver, and hence no contempt of the authority of the court; and that the sale therefore, in such a case, should be upheld. But, in conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in court, to abide the event of the litigation, and to be applied to the payment of the judgment creditor, who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made. And, in order to effect this, the court must administer it independently of any rights acquired by third persons, pending the litigation. Otherwise, the whole fund may have passed out of its hands before the final decree and the litigation become fruitless" * * *

"We agree, that the person holding the prior legal lien or incumbrance, must have notice, and an opportunity to come in and claim his prior right to the property or interest in the fund before his legal right can be affected: and the proper way is by summons or notice upon the order or direction of the court.

"This notice can be readily given on the report of the master, of the prior liens or incumbrances resting upon the estate.

"But it is not necessary to go this length in the case before us, *as it is sufficient to say that the sale under the judgment, pending the equity suit, and while the court was in possession of the estate without the leave of the court, was illegal*

and void. We do not doubt but that it would be competent for the court, in case the judgment creditor holding the prior lien had not come in and claimed his interest in the equity suit, to decree a sale in the final disposition of the fund subject to his judgment. The purchaser would then be bound to pay it off. But this disposition of the legal prior incumbrance is a very different matter, and comes to a very different result, from that of permitting the enforcement of it, *pendente lite*, without the leave of the court. The rights of the several claimants to the estate or fund is then settled, and the purchase under the decree can be made with a full knowledge of the condition of the title, or charges to which it may be subject.

"Neither do we doubt but that it is competent, and might, in some cases, be fit and proper for the court, where the property in dispute is ample, and the litigation protracted to permit the execution to issue, and compel the prosecuting creditor to pay off the judgment. (3 Beav. 428.) But it is manifest that these proceedings, on behalf of the prior incumbrances, should be under the control of the direction of the court, as the condition of the title to the property may frequently be so complicated and embarrassed, that unless the sale was withheld until the title was cleared up by the judgment of the court, great sacrifice must necessarily ensue to the parties interested.

This case affords an apt illustration of the remark. The marshal's sale was made under an arrangement that no money was to be paid by the purchaser, unless he succeeded in obtaining a title to the property under it. It is ob-

vious, therefore, if the purchase had been unconditional, and at the risk of the purchaser, it must have been bid off for a nominal consideration.

As we have already said, *it is sufficient, for the disposition of this case, to hold, that while the estate is in the custody of the court, as a fund to abide the result of a suit pending, no sale of the property can take place either on execution or otherwise, without the leave of the court for that purpose.* And upon this ground, *we hold that the sale by the marshal on the two judgments was illegal and void, and passed no title to the purchaser.*

We are also inclined to think that the question of title to the property under the marshal's sale is concluded between these parties by the judgment of the court in the proceedings on the petition by the purchaser for the removal of the receiver, and to be let into the possession. This, we have seen, is the appropriate remedy on behalf of a person claiming a paramount legal right to an estate which has been brought into the possession and safe keeping of the Court of Chancery, pending the litigation in respect to it.

This proceeding was explained by Lord Eldon in Angel v. Smith, 9 Ves. 335, speaking of the rule in respect to sequestrators, and which he held was equally applicable in the case of receivers. 'Where sequestrators,' he observed, 'are in possession under the process of the court, their possession is not to be disturbed, even by an adverse title, without leave: upon this principle, that the possession of the sequestrators is the possession of the court, and the court being competent to examine the title, will not permit itself

to be made a suitor in a court of law, but will itself examine the title. And the mode is, by permitting the party to come in to be examined *pro interesse suo;* the practice being, to go before the master to state his title, and there is the judgment of the master, and afterwards, if necessary, of the court upon it.' * * *

"The answer of Wiswall set up his right to the property under the decree in the suit against Ticknor and Day.

"The right of the petitioner, therefore, under his title to the possession of the property as against the right of Wiswall under the proceedings in equity and the decree in his favor, would seem to be a question directly involved. The court so understood the issue and passed upon it; holding, as we hold in this case, that the sale was illegal and void, having been made while the estate was in the possession and safe keeping of the Court of Chancery."

In *Peale v. Phipps*, 14 Howard 368, the decision in Wiswall v. Sampson was reaffirmed on appeal taken from an action in a Circuit Court of the United States, in which it was sought to compel the Trustees of a defunct corporation, acting under appointment of a state court, to pay over certain monies in their possession as such Trustees, to the plaintiff. The decision was that the Circuit Court of the United States had no jurisdiction to entertain the action, because the property sought to be reached by the suit was in the custody of the state court, and—

"while it thus remained in the custody and possession of that court awaiting its order and de-

cision, no other court had a right to interfere with it or wrest it from the hands of its agent, and thereby put it out of his power to perform his duty."

The decision in Wiswall v. Sampson, supra, was likewise reaffirmed in *Pulliam v. Osborne*, 17 How. 471-76, involving the question of priorities under the levy of successive executions issued out of the state and federal courts. The state levy was prior in point of time to that of the federal court execution, and this Court held that the tribunal which first acquires property by seizure, may dispose of it, discharged of claims of account of subsequent levies.

In *Taylor v. Carryl*, 61 U. S. (20 How.) 583, a vessel had been attached on process of a state court and while under such levy, it was attached and sold on a libel issued subsequently out of a federal court; it was held that the federal court had no jurisdiction, and that the sale by its marshal was inoperative and that the purchaser at the attachment sale had the title. In this case the rule of *Peck v. Jenness*, 7 How. 612, was approved and the doctrine of *Wiswall v. Sampson* was reaffirmed.

In *Yonley v. Lavender*, 88 U. S. (21 Wall.) 276, was involved the validity of two sales of real estate, one by an administrator acting under appointment of a state court, and the other under an execution sale upon a judgment rendered in a circuit court of the United States. The levy and sale under order of the circuit court having been made while the property was in custody of the state court, in the course of ad-

ministration. It was held that the levy and sale by the federal court, in disregard of the custody and jurisdiction of the property by the probate court was void and passed no title to the purchaser.

In *Barton v. Barbour*, 104 U. S. (14 Otto) 126, which was decided here before the Act of Congress authorizing the institution of suits against receivers of railroads without consent of the court in which the receivership was pending, this court held that an action would not lie against the receiver for damages on account of personal injuries sustained in the operation of a railroad by him. It was there *contended that the only consequence resulting from the failure to obtain leave to sue was that the plaintiff could be restrained by injunction or attached for contempt, but this Court held that the rule was not so limited, that the proceeding was void, and the doctrine of Wiswall v. Sampson was reaffirmed.*

In *Heidritter v. Elizabeth Oil Cloth Company*, 112 U. S. 294, the property involved had been taken into custody and sold by a marshal of the United States on process issued out of the federal court. After the marshal had levied on the property, actions were instituted in a state court to foreclose a mechanic's lien on the premises. These causes proceeded to judgment and the property was sold under order of the state court after the sale by the marshal. The instant case was between the purchasers at the two sales. This court held that the title to the property passed under the marshal's sale as against the claimant under the state court proceeding, saying:

"When, however, the proceedings were begun for the enforcement of the mechanics' liens against the premises in controversy, by the issuing of the summons and the filing of the declaration, the property over which the State Court sought to exert its jurisdiction, was in the actual custody and possession of the District Court of the United States for the District of New Jersey. It had been seized by an officer of the United States for an alleged offense against its laws. It was proceeded against as forfeited to the United States, and to declare and enforce that forfeiture judicially, it had been taken possession of by the court. This proceeding was undoubtedly in rem, *and it is quite immaterial whether the law authorized an absolute forfeiture of the res, including all interests and estates in it, so as to overreach antecedent liens and adverse claims, or only of the actual interest of the owner charged with the violations of law at the time of the alleged offenses. In either view and for either purpose, the court had taken possession of the property itself, and that possession was necessarily exclusive. The res was thereby drawn into the exclusive jurisdiction and dominion of the United States; and, for the purposes of that suit, it was, at the same time, withdrawn from the jurisdiction of the courts of New Jersey.* Any proceeding against it involving the control and disposition of it, in the latter, while in that condition, was as if it were a proceeding against property in another State. *It was vain, nugatory and void and, as against the proceedings and judgment of the District Court of the United States, and those claiming under them, was without effect.* • • •

"And the same conclusion must prevail here, for although the sale under the judgments in the

> State Court was not made until after the property had passed from the possession of the District Court by delivery to the purchaser at the sale under the decree, yet the initial step on which sheriff's sale depended, the commencement of the proceedings to enforce the mechanics' lien, asserting the jurisdiction and control of the State Court over the property sold, took place when that property was in the exclusive custody and control of the District Court; and by reason of its prosecution to a sale, was an invasion of the jurisdiction of that court. No stress is laid on the fact that notice of the proceeding, by affixing a copy of the summons upon the building, which was required by the statute, could only be made by an actual entry by the sheriff upon the property, to that extent disturbing the possession of the marshal, because the same result in our opinion, would have followed, if no such notice had been required or given. The substantial violation of the jurisdiction of the District Court consisted, in the control over the property in its possession, assumed and asserted in commencing the proceedings to enforce against it the lien claimed by the plaintiffs in those actions, prosecuting them to judgment and consummating them by a sale."

Wiswall v. Sampson was cited, approved and followed in this case, as were Peale v. Phipps, Pulliam v. Osborne, Taylor v. Carryl, Yonley v. Lavendar, and Barton v. Barbour.

In *Easton v. Gail*, 91 U. S. (1 Otto) 521, a mortgage foreclosure was commenced prior to bankruptcy. It was held by this Court that the state court could, and should, proceed to judgment without interference by the Trustee in Bankruptcy.

In *Porter v. Sabin*, 149 U. S. 473, this Court, in reasoning that a court which had appointed a receiver had the right, alone, to say whether or not an independent suit would be authorized against the receiver, and after such consent was denied, that another court had no jurisdiction to entertain the action, and thus overrule the denial of such right by the former, expressly approved and followed the doctrine announced in Wiswall v. Sampson, Peale v. Phipps, Barton v. Barbour, Pulliam v. Osborne, Heidritter v. Elizabeth Oil Cloth Co., and in re Tyler.

In *Byers v. McAuley*, 149 U. S. 608, the Federal District Court had entertained an action to distribute and wind up the affairs of the estate of a decedent, which was in custody of the state Probate Court, and in the action assumed full control of the administration of the estate. This Court, in denying the right of the District Court to act under such circumstances, said:

> "In order to pave the way to a clear understanding of this question, it may be well to state some general propositions which have become fully settled by the decisions of this court; and, first, it is a rule of general application, that where property is in the actual possession of one court, of competent jurisdiction, such possession cannot be disturbed by process out of another court. The doctrine has been affirmed again and again by this court. * * * 'The point of the decision in Freeman v. Howe, supra, is that, when property is taken and held under process, mesne or final, of a court of the United States, it is in the custody of the law, and within the exclusive

jurisdiction of the court from which the process has issued for the purposes of the writ; that the possession of the officer cannot be disturbed by process from any state court, because to disturb that possession would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer; that any person, not a party to the suit or judgment, whose property has been wrongfully, but under color of process, taken and withheld, may prosecute, by ancillary proceedings, in the court whence the process issued, his remedy for restitution of the property or its proceeds while remaining in the control of that court, but that all other remedies to which he may be entitled against officers or parties, not involving the withdrawal of the property or its proceeds from the custody of the officer and the jurisdiction of the court, he may pursue in any tribunal, state or Federal, having jurisdiction over the parties and the subject-matter. And, vice versa, the same principle protects the possession of the property while thus held, by process issuing from state courts, against any disturbance under process of the courts of the United States, excepting, of course, those cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the Constitution and laws of the United States."

"Secondly. An administrator appointed by a state court is an officer of that court; his possession of the decedent's property is a possession taken in obedience to the orders of that court; it is the possession of the court, and it is a possession which cannot be disturbed by any other court."

and, in the opinion recognized the settled doctrine that on the other hand an action to establish a debt could be maintained in a court other than the one having control of the property, provided the claim thus established was certified to the court having custody of the estate, for satisfaction.

In *Moran v. Sturges*, 154 U. S. 256, a receiver had been appointed by a state court, but he had not qualified and entered into possession of the vessel involved in that case when a libel was issued by a United States court and the vessel taken in charge by the United States marshal in an admiralty proceeding which was brought to enforce a maritime lien. This Court sustained the custody of the vessel obtained by the federal court. It was pointed out that the jurisdiction of the United States courts, in admiralty was paramount and exclusive, and that, while comomn law remedies could be pursued in the state courts, yet the proceedings in the state court must be had subject to the rights and remedies available in admiralty: that if the state court had prior possession (as in Taylor v. Carryl) the state court could proceed subject to the maritime lien and when its jurisdiction had determined the admiralty court could proceed.

The rule applicable was stated by the Chief Justice as follows:

> "The contention is not only that the title to these vessels vested in the receiver as of July 31 and that, in such a case as this, constructive is the equivalent of actual possession, but that although the receiver did not qualify until after

the seizure by the marshal, he thereupon became constructively possessed of the vessels as of July 31, and the jurisdiction of the district court was thereby ousted. But if jurisdiction had attached, it would not be defeated even by the withdrawal of the property for the purposes of the state court, and, moreover, the doctrine of relation has no application. As between two courts of concurrent and co-ordinate jurisdiction, having like jurisdiction over the subject matter in controversy, the court which first obtains jurisdiction is entitled to retain it without interference, and cannot be deprived of its right to do so because it may not have first obtained physical possession of the property in dispute. But where the jurisdiction is not concurrent and the subject-matter in litigation in the one is not within the cognizance of the other, while actual or even constructive possession may, for the time being, and in order to avoid unseemly collision, prevent the one from disturbing such possession, yet where there is neither actual nor constructive possession there is no obstacle to proceeding, and action thus taken cannot be invalidated by relation. That doctrine is resorted to only for the advancement of justice, and, under these state statutes, is adopted to defeat fraudulent, unwarranted, and unjust dispositions of the debtor's property, and to accomplish just and equitable ends. * * *

"At the time these libels were filed and the marshal seized the property, it had not been developed whether or when the receiver would or might give the security required and enter upon the discharge of his duties, and he had neither actual nor constructive possession.

"The jurisdiction of the state court over the subject-matter of the winding up of the corpora-

tion and the distribution of its assets did not embrace the disposition of the claims of the libelants upon these vessels, nor were they as holders of maritime liens represented by the attorney general when he assented to the order of July 31, as mere creditors of the Schuyler Company were. The adjudication by that order may have so operated on the title in respect of the parties to that suit as to place the property constructively in the custody of the law as of that date, but not as to all persons and for all purposes. Under the circumstances we are unable to accept the conclusion that simply by the institution of the winding up proceeding, property subject to liens over which that court could not exercise jurisdiction in invitum, was placed in such a situation in respect of liability to being ultimately brought within the custody of the court that the district court could not obtain jurisdiction for the purpose of ascertaining and enforcing those liens in respect of which its jurisdiction was exclusive. It appears to us that the district court violated no rule of comity nor any other rule in entertaining the libels."

The foregoing rule was reaffirmed by the late Chief Justice of this Court, in practically the same language in the case of *Hankin v. Brundage*, 276 U. S. 36.

In *Shields v. Coleman*, 157 U. S. 168, the single question was presented whether a Federal Court had power to appoint a receiver and take property out of the possession of a receiver appointed by a state court, and it was held that the Federal Court had no such jurisdiction.

The error in those cases in some of the district and circuit courts (see In Re Ginesti and Duncan v. Girard, infra pp. 86, 87) in which it has been held that Courts of Bankruptcy do not acquire jurisdiction of property against which a Trustee under a deed of trust with power of sale has commenced foreclosure by advertising, where the bankrupt is actually or constructively in possession, is apparent from a consideration of the case of *Ex Parte* (Bethea), 165 U. S. 443, in which the general rule is recognized, that where property is actually in possession of one court of competent jurisdiction, such possession cannot be disturbed by another court of concurrent jurisdiction, but held it to be inapplicable in the case of a receiver of a National Bank appointed by the Comptroller of Currency.

In Wabash Railroad Company v. Adelbert College, 208 U. S. 38, the receivers had been appointed for the railroad and were in possession when a suit was brought in a state court to foreclose a mortgage against the same. After the suit in the state court was instituted, the receivers sold the property of the Company, delivered it to purchasers and were discharged. Fourteen years later, the state court case was called to trial. By the terms of the decree of foreclosure in the Federal Court, jurisdiction was retained of the entire subject-matter involved, including the claim asserted against the property in the state court proceeding. This Court held, in view of these circumstances that the judgment of the state court was void, saying

"When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. For the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession, or the control of the property. In the courts of the United States this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship or the nature of the controversy. Those principles are of general application, and not peculiar to the relations of the courts of the United States to the courts of the states; they are, however, of especial importance with respect to the relation of those courts, which exercise independent jurisdiction in the same territory, often over the same property, persons and controversies; they are not based upon any supposed superiority of one court over the others, but serve to prevent a conflict over the possession of property, which would be unseemly and unobversive of justice; and have been applied by this court in many cases, some of which are cited, sometimes in favor of the jurisdiction of the courts of the states and sometimes in favor of the jurisdiction of the courts of the United States, but always, it is believed, impartially and

with a spirit of respect for the just authority of the states of the Union. * * *

"It follows, therefore, that the state court was without power to decree a sale of the property, and its judgment must be reversed."

On the rehearing in that case (208 U. S. 609) it was held in effect that under such circumstances the judgment of the state court cannot be other than in rem, affecting only the property involved, the declaration of the lien is an invasion of the possession of the Federal Court, which is beyond the jurisdiction of the court.

On the other hand, the case of *Ingersoll v. Coram*, 211 U. S. 335, furnishes an illustration of the rule that where the parties are personally before the court, and the property is in the possession of another court, the former court may determine their rights as between one another, leaving the satisfaction of the judgment to the court which has possession of the property. The court distinguishes between the Adelbert College case and Byers v. McAuley on this point (p. 359). To the same effect see *Waterman v. Canal-Louisiana Bank and Trust Company*, 215 U. S. 33. See also *Riehl, Receiver, v. Margolies*, 279 U. S. 218.

In *Hebert v. Crawford*, 228 U. S. 204, was involved a conflict of jurisdiction between the State and Bankruptcy court as to who was in possession of certain property belonging to the bankrupt at the time of the filing of the petition. It was held that if the property was in possession of the bankrupt at the time of filing the petition, the Bankruptcy Court had juris-

diction to administer it and to determine all claims to the property. It also held inferentially that orders of the Bankruptcy Court were not subject to review by any other State or Federal Court of concurrent jurisdiction.

In *Murphy v. Hofman*, 211 U. S. 562, a Receiver in Bankruptcy had been appointed, and had taken possession of certain personal property of the bankrupt. A creditor, claiming title to a part of the property thereafter instituted action in the state court and undertook to replevy the property. The Bankruptcy Court enjoined the state court proceeding, and thereafter vacated the injunction. In the meantime, the property was sold by the Trustee. The Receiver appeared in the state court and answered that at the time its proceeding was instituted he was in possession of the property as Receiver of the bankrupt, and remained so until the adjudication, when he was appointed Trustee. The case turned on the right of the state court to proceed under the circumstances. The Supreme Court say:

> "The Bankruptcy Act of 1898, as originally enacted did not confer jurisdiction on the District Court of the United States over suits brought by trustees in bankruptcy to assert title to property as assets of the bankrupt or to set aside transfers made by the bankrupt in fraud of the creditors, or by way of preference, unless by consent of the defendant. * * * The act, however, preserves the jurisdiction, otherwise existing by statute, of the Courts of the United States, though it is limited to courts where the bankrupt himself could have

prosecuted the action. * * * But where the property in dispute is in the actual possessoin of the court of bankruptcy, there comes into play another principle, not peculiar to courts of bankruptcy, but applicable to all courts, Federal or State.

"Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court having possession of the property has an ancillary jurisdiction to hear and determine all matters respecting the title, possession or control of the property.

"In the Courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. The jurisdiction in such cases arises out of the possession of the property, and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them.

"Wabash R. R. v. Adlbert College, 208 U. S. 38.

"Accordingly, where property was in the possession of the bankrupt at the time of the appointment of a Receiver, it was held that the Bankruptcy Court had jurisdiction to determine the title to it as against an adverse claimant, and that the Receiver had no right to deliver it to him without the order of the court. * * *

"When the court of bankruptcy, through the acts of its officers, such as Referee, Receivers or Trustees, has taken possession of a res, as the property of the bankrupt, it has summary jurisdiction to hear and determine the adverse claims

> of strangers to it, and * * * its possession cannot be disturbed by the process of another court. * * *
>
> "On the whole case, we are of the opinion that the seizure of these goods on a writ of replevin from another court was an unlawful invasion of the possession of the court of bankruptcy, which cannot be disturbed. * * * "

The case of *Whiting v. Wenman*, 198 U. S. 539, involved the question of the right of a Trustee to maintain in the Federal Court an action to recover for goods that were constructively in the possession of the bankrupt,—the same having been placed with a warehouseman by the bankrupt. The court pointed out that *Bardes v. Bank*, 178 U. S. 524, did not determine the right of the Bankruptcy Court to entertain jurisdiction of a proceeding, having in view an adjudication of rights in or liens upon property which came into the possession of the Bankruptcy Court, as that of the bankrupt; the right to proceed concerning which would seem to be broadly conferred in the section of the Bankruptcy Act above quoted. (Section 2 (3) (7); and said of *White v. Schloerb*, 178 U. S. 542, that in that case, which was decided with the Bardes case, it was held that

> "After adjudication an action in replevin could not be brought in the State Court to recover property in the possession of and held by the bankrupt at the time of the adjudication, and in the hands of the Receiver in Bankruptcy when the action was begun, that the District Court of the United States sitting in Bankruptcy had power by summary process to compel the return of the property seized."

> property was voluntarily turned over by the Receiver, and thereby the jurisdiction of the District Court upon the ground herein stated, is defeated, as the property is no longer in the possession or subject to the control of the court, but the Receiver had no power or authority under the allegations of this bill to turn over the property * * * the court had possession of the property and jurisdiction to hear and determine the interest of those claiming a lien therein or ownership thereof. We do not think this jurisdiction can be ousted by a surrender of the property by a Receiver and without authority of the court."

In *Wilson v. Seligman*, 178 U. S. 542, it was held that a replevin action in a state court could not be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of his adjudication, after the adjudication had been made, because the property in controversy was in custodia legis.

In *Chapman v. Hoover*, 114 U. S. 158, 172-3, the principle that property in the custody of a Trustee in Bankruptcy is in custodia legis, and that his possession cannot be interfered with by any other court is recognized.

In re *Tyler*, 149 U. S. 164, which was cited in support of the holding of the court in *Dayton v. Stanard*, 241 U. S. 588, property had been placed in the custody of a chancery receiver when tax executions were issued and levied upon the property. The Sheriff who made the levy was committed for contempt, and brought the instant action to secure his discharge on

habeas corpus from the commitment. In speaking of the effect of the appointment of a receiver the court say:

> "No rule is better settled than that when a court has appointed a receiver, his possession is the possession of the court, for the benefit of the parties to the suit and all concerned, and cannot be disturbed without the leave of the court; and that if any person, without leave, interferes with such possession, he necessarily commits a contempt of court, and is liable to punishment therefor * * *.
>
> "The general doctrine that property in the possession of a receiver appointed by a court is in custodia legis, and that unauthorized interference with such possession is punishable as a contempt, is conceded; but it is contended that this salutary rule has no application to the collection of taxes. Undoubtedly property so situated is not thereby rendered exempt from the imposition of taxes by the government within whose jurisdiction the property is, and the lien for taxes is superior to all other liens whatsoever, except judicial costs, when the property is rightfully in the custody of the law, but this does not justify a physical invasion of such custody and the wanton disregard of the orders of the court in respect to it.
>
> "The maintenance of the system of checks and balances charactristic of republican institutions requires the coordinate departments of government, whether Federal or State, to refrain from any infringement of the independence of each other, and the possession of property by the judicial department cannot be arbitrarily encroached

upon, save in violation of this fundamental principle.

"The levy of a tax warrant, like the levy of an ordinary, fieri facias, sequestrates the property to answer the exigency of the right; but property in possession of the receiver is already in sequestration, already in equitable execution, and while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done; and a seizure of the property against its will can only be predicated upon the assumption that the court will fail in the discharge of its duty, an assumption carrying a contempt upon its face."

Riehle, Receiver, v. Marjolies, 279 U. S. 218, (decided April 8, 1929) involved the right of a creditor to maintain an action against his debtor after a Receiver had been appointed. Judgment was rendered in the state court action, and it was contended that the judgment was void. The court held that the action in personam to establish the claim would be decided in the state court, but that no one can obtain any part of the assets or enforce a right to specific property in possession of a Receiver except upon application to the court which appointed him.

Harkin v. Brundage, 276 U. S. 36. This case involved the question of the right of a State or Federal Receiver, and the court said:

"As between two courts of concurrent and coordinate jurisdiction, the court which first obtained jurisdiction and constructive possession of

property by filing the bill is entitled to retain it without interference, and cannot be deprived of its right to do so, because it may not have obtained prior physical possession by its Receiver of the property in dispute."

In *Dayton v. Stanard*, 241 U. S. 588, the validity of certain tax sales made after the bankruptcy proceedings had intervened was involved. Solely on the ground that the property sought to be sold was in custodia legis, and was sold without leave of court, the sales were held to be invalid on authority of *Wiswall v. Sampson* (14 Howard), 55 U. S. 52; *Barton v. Barbour*, 104 U. S. 126; In re *Tyler*, 149 U. S. 164, and In re *Epstein*, 156 Fed. 42.

What was said by this Court in Wiswall v. Sampson, supra, pp. 32-33, of a sale where the title to the property was in an embarrassed condition, is applicable here. The trustee on the one hand is claiming the right to administer the property of the bankrupt, under orders of the Bankruptcy Court; he is, regardless of the sale by the District Court, in possession. On the other hand, the Appellee was claiming the right to have the property sold by the District Court, and the District Court granted such relief. An appeal was promptly allowed from the decree of the District Court, and the jurisdiction of the District Court to enter the decree was challenged. These are matters of which an intending purchaser at a foreclosure sale would naturally take notice. In such a situation, it is obvious that the Appellee would be the only purchaser at the sale, and that the property would go at a sacri-

fice. The Trustee was not in the same position as an ordinary individual.

It is admitted that at the time of sale, he had not been able to sufficiently inform himself concerning the property to offer it for sale. He could not, under these conditions, know whether it would be safe to invest funds of the estate in the property, even though he had sufficient money on hand to pay off the mortgage. Under the admitted facts, it will not do to say that the Trustee should have paid off the mortgage. If he did not have the money to pay it off, the general creditors should not be prejudiced by losing the value of the equity, simply because of a desire on the part of the holder of the debt to proceed to foreclose his lien. On the other hand, if he did have the money, and had no sufficient information regarding the matter, he should not be embarrassed by a forced sale without the consent of the Bankruptcy Court, which alone could determine whether or not it was advisable and to the best interest of the estate that the debt be paid off. The principle of this case is applicable alike to cases that arise in the state and federal courts, and it will create a serious impediment to the proper administration of the bankruptcy law if any other court than the Bankruptcy Court may force speedy action upon the part of the Trustee, without the consent of the Bankruptcy Court in matters of this kind. In fact, it is inconceivable that any court can, by threatening seizure and sale of the assets of the bankrupt in the custody of the Bankruptcy Court, compel it to act.

On the Other Hand If a State Court First Has Jurisdiction Which Is Not Avoided By the Bankruptcy Proceeding, It Retains It

The case of *Lion Bonding Company v. Karatz*, 262 U. S. 77, involved a conflict of jurisdiction between Receivers appointed by different courts in ordinary chancery suits. The Supreme Court, citing bankruptcy and chancery cases in which the principle had previously been announced, held that the state court having first acquired jurisdiction of the subject matter of the suit had power to hear and determine all controversies relating thereto, and while continuing to exercise such prior jurisdiction had the authority to determine for itself how far it would permit any other court to interfere with such possession and jurisdiction. Citing on the latter point *Palmer v. Texas*, 212 U. S. 118, in which it was also held that where a state court had acquired jurisdiction over property before application made to a Federal Court the court of the state had the right to determine for itself, while continuing to lawfully exercise its prior jurisdiction, how far it would permit any other court to interfere with such possession and jurisdiction.

In *Taubel, etc., Company v. Fox*, 264 U. S. 427, prior to bankruptcy a creditor of the bankrupt had secured a judgment and levied an execution upon property of the bankrupt. The trustee by summary process attempted to have the execution declared void,

and to obtain possession of the property. Jurisdiction of the court was attacked, and in passing on the question the court held that under the bankruptcy act the court had summary jurisdiction to adjudicate, without consent, controversies relating to the title of property which had come into its possession; that constructive possession was sufficient, and that such possession existed where property was in the physical possession of the debtor at the time the petition was filed, but was not delivered to the Trustee; where it was delivered to the Trustee, and was thereafter wrongfully withdrawn from his custody; where it was in the hands of the bankrupt's agent or bailee; where it was held by some other person, who makes no claim to it; and where the property was held by one who makes the claim, but the claim was colorable only; and finally on the question arising in the case that because the Sheriff, acting under orders of the State Court, had possession prior to the bankruptcy, the Bankruptcy Court did not have possession, either actual or constructive, and, therefore, that even though the lien of the execution might be declared invalid in a plenary action, it might not be so declared in a summary proceeding.

In *Hobbs v. Head, etc. Company*, 231 U. S. 692, the Trustee undertook to prevent the enforcement of a labor lien in a state court. The state court proceedings had passed to judgment before the adjudication of bankruptcy. It was held that the Bankruptcy Court properly denied the Trustee's petition to stay the state court proceedings.

In *York Mfg. Co. v. Cassell*, 201 U. S. 344, was involved the question of the right of the seller under a conditional sale contract to retake the property sold after the bankruptcy proceedings. The court held that the Trustee stood in the shoes of the bankrupt, and had no greater right than the bankrupt himself to the property, and that the seller had the right to the property. The proceeding, however, was in the Bankruptcy Court on the application of the creditor for the return of the property, and the case did not involve a conflict of jurisdiction.

In *Metcalf v. Barker*, 187 U. S. 165, it appeared that the bankrupts had transferred all their property to certain favored creditors and confessed various judgments in the state courts in favor of others, upon which executions were issued and levied upon personal property. A Receiver was appointed collusively, and other creditors instituted replevin actions. A judgment creditors action was also instituted, as a result of which the transfers were adjudged fraudulent. After these proceedings had terminated, and while the Receivers were in possession of the property under their appointment, a bankruptcy proceeding was instituted, and when a Trustee was appointed an application was made to the Federal Court in which the bankruptcy proceeding was pending for an injunction against further proceedings under the creditors action. The defendants in the creditors action objected to the jurisdiction of the bankruptcy court on the ground that they were not parties and had not been made parties to the proceeding. The in-

junction was granted. The filing of the judgment creditors bill and service of process was held to constitute an equitable lien on the assets, and as the lien was created more than four months prior to the bankruptcy proceeding, that the bankruptcy did not avoid it, but that the Trustee took his title as it was when the bankruptcy proceeding was instituted. It was held that as the state court had jurisdiction over the parties and subject matter and possession of the property, that court had exclusive jurisdiction to decide upon conflicting claims to its ultimate possession and control.

In *Jerome v. McCarter*, 94 U. S. 734, prior to the bankruptcy proceeding an action had been commenced in the state court to foreclose a prior valid mortgage. After the bankruptcy, the trustees were made parties defendant, and contended that as the bankruptcy proceeding had been instituted before the foreclosure decree was entered, the bankruptcy court had exclusive jurisdiction, and was entitled to the entire administration of the bankrupt's property. It was held that the objection was without merit. On authority of *Eyster v. Gaff*, 91 U. S. 521, in which a foreclosure proceeding was instituted prior to the bankruptcy proceeding, and the decree entered thereafter, the court saying, in answer to the contention of the assignee in bankruptcy that the court was without jurisdiction to render the decree, that as no sale or conveyance by the mortgagor pending the foreclosure proceedings could defeat the decree, and as the operation of the bankruptcy proceedings was similar to that

of a conveyance pendente lite, the Bankruptcy Act did not operate to affect the pending foreclosure suit. And,

"The court in the case before us had acquired jurisdiction of the parties, and of the subject matter of the suit. It was competent to administer full justice and was proceeding according to the law which governed such a suit to do so. It could not take judicial notice of the proceedings in bankruptcy in another court, however seriously might have been affected the rights of parties to the suit already pending," and that the trustee could, if he desired, defend the pending case."

If a State Court Has Jurisdiction or Custody By Process Which Is Avoided By Bankruptcy, the Latter Court Is Entitled to Possession

In *Davis v. Friedlander*, 104 U. S. 570, an attachment had been levied upon property of the bankrupt more than four months prior to the filing of the petition for adjudication. The lien of the attachment was, therefore, good, and it was recognized that the State Court's jurisdiction was paramount; also that the Trustees in Bankruptcy, where a prior action was pending, had the right to appear in the State Court, and there make any defense they desired, and failing to do so they were bound by the decree there entered.

In *Lehman v. Gumble*, 236 U. S. 448, because a lien created by the levy of an attachment within four months of the filing of the petition in bankruptcy was voided by the provisions of Section 67-F of the Bank-

ruptcy Act, it was held that the prior possession of the State Court was no obstacle to the exercise by the Bankruptcy Court of jurisdiction over the property, and that it was properly seized by the Receiver of the Bankruptcy Court.

In *Watts v. Sachs*, 190 U. S. 1, 27, a receivership to wind up a corporation had been instituted in the state court when the bankruptcy proceeding intervened. The court held that the operation of the bankruptcy laws cannot be defeated by insolvent corporations applying to be wound up under state suits. "The bankruptcy law is paramount and the jurisdiction of the Federal Courts in bankruptcy, when properly invoked in the administration of the affairs of insolvent persons and corporations is essentially exclusive. Necessarily, when proceedings in a state court are determined by the commencement of proceedings in bankruptcy, care has to be taken to avoid collision in respect of property in possession of the state courts. Such cases are not cases of adverse possesison or of possession in enforcement of pre-existing liens or in aid of the bankruptcy proceedings. The general rule as between courts of concurrent jurisdiction is that property already in possession of the Receiver of one court cannot rightfully be taken from him without the court's consent by the Receiver of another court appointed in a subsequent suit, but that rule can have only a qualified application where winding-up proceedings are superseded by those in bankruptcy as to which the jurisdiction is not concurrent."

In an appendix hereto is a digest of all of the cases

in the district courts and circuit courts of appeal, involving in any way this point decided since 1910.

On the Second Point

On this point the only question is:

Can a Trustee in Bankruptcy appeal and have a stay of the judgment or decree against him without giving a supersedeas bond?

The facts upon which this point is predicated are set forth on page 7 hereof.

The Bankruptcy Act (11 U. S. C. A., Sec. 48b) provides:

> "Trustees shall not be required to give bonds when they take appeals or sue out writs of error."

If this section means what it says, and what we believe it means, it is possible that a formal order staying proceedings would not be necessary as the allowance of an appeal would operate ipso facto to suspend the enforcement of the decree, so that any process issued thereon, pending an appeal, would be void, even though the court had jurisdiction of the property.

The general provisions relating to appeals are as follows:

28 U. S. C. A., Section 870:

> "Whenever a writ of error, appeal, or other process in law, admirality, or equity, issues from or is brought up to the Supreme Court, or a circuit court of appeals, either by the United States

or by *direction of any department* of the Government, no bond, obligation, or security shall be required from the United States, or from any *party acting under the direction aforesaid, either to prosecute said suit, or to answer in damages or costs*. In case of an adverse decision, such costs as by law are taxable against the United States, or against the party acting by direction as aforesaid, shall be paid out of the contingent fund of the department under whose directions the proceedings were instituted." (R. S., Section 1001; March 3, 1911, c. 231, Sections 118, 289, 26 Stat. 1131, 1167.)

28 U. S. C. A., Section 869:

"Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid." (R. S., Section 1000.)

28 U. S. C. A., Section 874:

"In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the

> citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a supersedeas, execution shall not issue until the expiration of ten days." (R. S., Section 1007; February 18, 1875, c. 80, Section 1, 18 Stat. 318.)

So far as we have been able to find, the question has never been directly presented to any court. It was indirectly presented in the Ninth Circuit in *Pacific Coast Casualty Company v. Harvey*, 250 Fed. 952, and without analysis or discussion, Section 48b of the Bankruptcy Act was construed adversely to our contention. In that case the court say:

> "It is true that under Section 25c of the Bankruptcy Act (now 11, U. S. C. A. 48b), the trustee was not required to give bond when he took the appeal or sued out a writ of error; but a supersedeas pending the appeal, though an auxiliary, was a separate matter. The appellate court could undoubtedly have reviewed the proceedings, even though appellant had failed to give any bond to supersede the proceedings on a judgment or decree entered against him. Logan v. Goodwin, 104 Fed. 494. Revised Statutes, Section 1000 (28 U. S. C. A., 869), is the general provision on appeal, for costs and damages or for costs only, according to whether or not supersedeas is obtained; but we do not think that Section 25c (11 U. S. C. A., 48b) relieving a trustee in bankruptcy from giving bond on appeal

> or writ of error, relieves him from the obligation to give such a bond as is required of any litigant where supersedeas is desired. In Re Barrett, 132 Fed. 362."

In that case the issue was as to whether a surety on a bond given in the form of supersedeas bond was liable for *costs* adjudged against a trustee in bankruptcy, so that what was said with reference to supersedeas is really no more than dicta. The case of Barrett, 132 Fed. 362, cited in the opinion, did not involve the question at all. There a receiver in bankruptcy had instituted a suit in equity for injunction and other relief, and a motion was filed to require him to give a cost and injunction bond as in other cases. It was held by the District Court he should not be required to do so. The point in the Pacific case for which it is cited as authority was not decided or discussed. So far as we have found the case has never been cited by any other court on the point at issue.

When we look to the nature and purpose of Section 48-b, there can be little doubt of the intention of Congress. Trustees in bankruptcy are officers of the court appointing them. *In Re Cadenas & Coe*, 178 Fed. 158; *In Re Howard*, 130 Fed. 1004, 135 Fed. 721. Their office is created by Congress (11 U. S. C. A., 61: "The offices of referee and trustee are created"). They have powers defined by the Act (11 U. S. C. A., 75) and a title conferred by it upon them (11 U. S. C. A., 110). Property thus acquired is held by them by virtue of their office, in custodia legis, *U. S. F. & G. Company v. Bray*, 225 U. S. 205; *Robertson*

v. Howard, 229 U. S. 254; *In Re Sheinman*, 14 Fed. (2) 323; *In Re Eppstein*, 156 Fed. 42. Clearly their rights, powers and relation to the property is of a higher order than possessed by any other custodian or receiver that could be appointed by the judicial branch of the government.

From the standpoint of creditors and those with whom the trustee may litigate, their rights and the trustee's are fixed as of the adjudication. The former are entitled to a distribution of the estate under principles fixed by the act, the latter is entitled to enforce this distribution and to protect and recover the estate. No provision of the act or any other act, contemplates that a creditor can by virtue of any action on his part secure a greater benefit from the estate than is contemplated under it. For instance, the trustee may contest a claim and on losing appeal, but a supersedeas against the collection of it, as a supersedeas is ordinarily given, would not, the trustee being defeated on the appeal, render the estate liable for the entire claim. A more apt illustration is afforded by the facts of this case. Here the trustee is seeking to deprive the appellee of the remedy of foreclosure without the consent of the bankruptcy court, on property in its custody. This right has been denied him and he appeals. It is said he has no right to stay the sale without a supersedeas bond. Now, what damages could be here allowed the appellee, a creditor, whose rights are fixed by the act, without running afoul the act itself. The estate is not liable for a deficiency under the mortgage should there be one, but a supersedeas bond could

possibly make it so, notwithstanding the trustee obviously has no power or authority to assume an indebtedness on behalf of the estate which it would not otherwise owe. A supersedeas bond in a mortgage foreclosure is fixed at an amount sufficient to cover costs of the appeal and for delay if the appeal is without justification. *Omaha Hotel Company v. Kountze,* 107 U. S. 378. The theory being, as the court in that case, after an extended review of the authorities, said:

> "In view of the authorities, therefore, as far as they go, if the bond in the present case is to be regarded as important nothing more than the bond prescribed by the statute, it is clear that it did not operate as security for the original decree, nor for the interest which accrued pending the appeal, nor, by consequence, for the balance of these amounts, or either of them, after applying the proceeds of the mortgaged property. The item of $530 costs unpaid by the defendants in the original foreclosure suit, came under the same head, being part of the original decree, to pay which the lands were ordered to be sold. The only ground of recovery upon the bond could be: 1, the depreciation of the property in market value pending the appeal; or 2, its deterioration by waste, or want of repair, or the accumulation of taxes or other burdens; or 3, the use and detention of the property pending the appeal, that is, the rents and profits; or 4, the non-payment of the costs of the appeal, which accrued in this court; but the special verdict does not find that these costs were unpaid.
>
> "If depreciation in market value can ever be laid as cause of legal damages on a bond in error, which we greatly doubt, it cannot be done in this

case, because it is found by the special verdict that the property considerably increased in value pending the appeal. Deterioration by waste, etc., is a very different matter; but that is equally out of the question in this case, as no deterioration is shown. The defendants paid the taxes and insurance, and kept the property in repair. The principal question for consideration, therefore, is, whether the plaintiffs were entitled to recover the rents and profits, or damages for the use and detention, as it is otherwise called.

"We have seen that even in ejectment, it has at least been questioned by this court whether the bond in error covers rents and profits accruing pending the writ. And yet there is a material difference between the case of ejectment and a suit for the foreclosure of a mortgage.

"The difference is this: in ejectment, the property of the land is in question, and if the plaintiff has the right, he is entitled to immediate possession and to the perception of the rents and profits, which belong to him, and for which the defendant in possession is accountable to him. Every dollar, or dollar's worth, is so much of the plaintiff's property of which he is deprived. And the same is true in dower. But in the case of a mortgage, the land is in the nature of a pledge; and it is only the land itself, the specific thing, which is pledged. The rents and profits are not pledged: they belong to the tenant in possession, whether the mortgagor or a third person claiming under him. This is not only the common law, but it is the express statute law of Nebraska, which declares that 'In the absence of stipulations to the contrary, the mortgagor retains the legal title and right of possession.' The plaintiff, in this case,

was not entitled to possession, nor, to the rents and profits. His foreclosure suit did not seek possession, but sought a sale of the specific thing, the land. In such a case, until the litigation is ended, it doth not appear that there must be a sale, or even that the plaintiff is entitled to a sale. The defendant in possession is entitled to redeem the land until a sale is made, and until then he is entitled to the rents and profits, which belong to him, as of right. The taking of the rents and profits prior to the sale does not injure the mortgagee, for the simple reason that they do not belong to him. Waste, that is, destruction or injury to the land itself, as before stated, is an injury to the mortgagee. It diminishes the value of the pledge; and for such injury no doubt he might recover on the appeal bond. Other deteriorations, such as occur by want of repairs, accumulation of taxes, fires not covered by reasonable insurance, and the like, probably might also be fairly covered by the bond. But perception of rents and profits is the mortgagor's right until a final determination of the right to sell, and a sale made accordingly.

"The mere delay of the sale for the purposes of an appeal does not operate to the legal injury of the mortgagee. It does not suspend execution for the debt; he has no right to such an execution by the decree of foreclosure and sale. It is not a decree against the person, and cannot be enforced by an execution against goods and lands generally. It is simply a decree for the sale of the land mortgaged, in order that the proceeds may be applied to the debt. The amount due is ascertained by the decree, it is true, but only for the purpose of determining the amount of charge on the land. The debt may be prosecuted by a per-

sonal action against the debtor, and this may be the defendants in the suit or some other person. The rule of court by which a personal decree may, in some cases, be entered up against the mortgagor for the residue of the debt, after the proceeds arising from the sale of the land have been applied, is a recent rule intended to obviate the necessity of a separate action. It has not changed the essential nature of the decree for foreclosure and sale.

"It often happens that the debt is not fully ascertained when a decree for sale and foreclosure is made; as where there are many outstanding bonds which have to be called in and verified. The sale, in such cases, is frequently made in advance, and the proceeds brought into court for distribution amongst those who may appear to be entitled thereto; all which shows that a decree of foreclosure is a very different thing from a personal decree or judgment for the debt.

"As it is a specific thing, the land itself, and not the rents and profits, that constitutes the pledge, the delay of sale caused by the appeal, as before said, deprives the mortgagee of no legal right. It may be an incident of disadvantage or inconvenience, but in our judgment it is not a legal damage contemplated by the appeal bond. We are aware that a contrary view has sometimes been taken at the circuit; but upon a full consideration of the subject, we have come to the conclusion now expressed. The chances of actual deterioration and waste in certain classes of property are so great, that a bond in a considerable amount may well be required; and if actual deterioration and waste supervenes, the amount may properly be recovered.

"In addition to these general considerations, a careful examination of the 29th rule will show that in cases like the present, it does not, in terms at least, contemplate security for the use and detention of the property pending the appeal. The words are 'indemnity in all such cases (where the property in controversy necessarily follows the event of the suit) is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, etc.' 'The sum recovered for use and detention,' here referred to, means the sum recovered in the original judgment or decree, such as damages and mesne profits in ejectment, damages in dower, and replevin, etc., and the phrase 'just damages for delay' refers to those damages arising from the delay occasioned by the proceedings in error or appeal which are properly a legal damage to the party delayed. We are thrown back, therefore, to a consideration of the nature of the particular case, to ascertain what those legal damages properly are. The words 'use and detention' do not assist us, as they relate to a cause of recovery in the original judgment.

"There is another consideration which relieves the conclusion which we have reached from any supposed hardship or injustice to mortgagees. Courts of equity always have the power where the debtor is insolvent, and the mortgage property is an insufficient security for the debt, and there is a good cause to believe that it will be wasted or deteriorated in the hands of the mortgagor, as by cutting of timber, suffering dilapidation, etc., to take charge of the property by means of a receiver, and preserve not only the corpus, but the rents and profits for the satisfaction of

> the debt. When justice requires this course to be pursued, and it is resorted to by the mortgagee, it will give him ample protection. There is no necessity, therefore, in order to protect him from injury, that a party in order to have the benefit of an apepal, should be obliged to give security to account for the intermediate rents and profits of his own property." (Rule 29 is now Rule 33.)

Is it possible that a bankrupt estate not otherwise liable for debt, or interest, or a penalty or waste, or delay, or the ordinary results of losing an appeal, could be held therefore on an ordinary assumption of it? When we consider the law itself there is no ground for such a view. The delay thus caused by the trustee, is a delay of the law itself, for which no one interested should suffer or gain. The estate should not be penalized for the act of the trustee in the performance of his duty and his opponent should not gain by it an advantage the act does not in spirit or tenor afford. We know of no principle of bankruptcy law under which when an estate is being administered for the benefit of creditors, whereby the creditors can get damage for waste or the like, for delay, or anything else, from the bankruptcy court itself.

We suggest that as in the ordinary case of receivership, judgments against a trustee should not be executed upon property of the trustee, but certified to the court having custody of the property for observance. This done, no supersedeas would be necessary, for it must be assumed the court having such custody will do its duty. The creditor is certainly not entitled

to additional security for his claim simply because of the appeal.

The foregoing general observations as to the nature and character of a supersedeas, and as to the trustee's position make it clear that even without the significant mandate of Section 48b it is doubtful if a bond to stay a decree appealed from by a trustee should or could be required. Congress evidently intended to relieve the trustee of the duty of making bond for these reasons. When it is said the trustee shall not be required to give bond when he appeals it is foolish to say he must give bond.

When we consider that section in conjunction with the other sections quoted above, relative to bonds on appeal, it is perfectly clear that the trustee should be treated as being within the excepted classes named. He appeals, not so much in his own right, as to vindicate and secure an enforcement of the mandates of the bankruptcy act under administration by the judicial department of the Government. His office requires it, as much so as though he were the Comptroller of Currency, Secretary of the Treasury, of State, the Attorney General, or any other Governmental Department head. His office places him in the position of an agent of the Government for the enforcement of the Bankruptcy Act. And the enforcement of that law is as much a part of the plenary power and duty of the government as any other. The trustee's office is created for that purpose, with as much dignity attaching to it as to any other office of the government. Section 870 of Title 28 exempts gov-

ernmental agencies from the operation of Section 869 and 874. Receivers of Federal courts are exempt under its provisions. *Central Trust Co. v. St. L., etc., R. Co.*, 41 Fed. 551; *Pepper v. Bank*, 125 Fed. 822; *Bank v. Mixter*, 114 Fed. 463, although the contrary has been held by a New York circuit court. *Peatt v. Advance*, 90 Fed. 772. The trustee is under the same head. And, when we consider Title 11, Section 48b, which clearly exempts him from giving "bond" on appeals or writs of error, in the light of the purposes of the act as a whole, and in connection with Title 28, Sections 869, 870 and 874, there is no escape from the conclusion that the trustee is exempted from giving any sort of bond whatsoever. To say he need not give a bond for costs, but must give a supersedeas bond under this section is a contradiction of the Statute. There are only two classes of bonds on appeal. Neither is jurisdictional, as held in *Rederiaktiebolazet Amie v. Transp. Company*, 245 Fed. 282, and *Omaha Hotel Company v. Rountze*, supra. Both classes of bonds are the subject of all three of the Sections of the Judiciary Article (869, 870, 874). To require one and not the other, therefore, creates an irreconcilable conflict with 11 U. S. C. A. 48b.

CONCLUSION

For the reasons stated we respectfully submit the decree appealed from should be reversed and the cause ordered dismissed for want of jurisdiction.

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APPENDIX

DIGEST OF DISTRICT AND C. C. A. CASES HOLDING:

That the Bankruptcy Court Having First Acquired Jurisdiction of Property Retains It Against All Others

In *First Trust Company v. Baylor* (C. C. A. 8), 1 Fed. (2d) 24, a foreclosure proceeding was instituted in a State Court to foreclose a valid mortgage prior to bankruptcy. A Receiver was appointed in the foreclosure suit, which was reversed, and subsequent to the bankruptcy another foreclosure suit was filed in the State Court. The Trustee sought an injunction in the bankruptcy proceeding to restrain the foreclosure suit, on the ground that the property was in custodia legis at the time the foreclosure was instituted. The injunction was granted and the mortgagee appealed .

The Court held that the State Court had no jurisdiction at any time over the subject matter, because the first sale was void, and the purchaser held the property for the bankrupt, so that the property was in the custody and under the jurisdiction of the Bankruptcy Court. The Court say:

> "The foreclosure suit was filed after the petition in bankruptcy. Therefore the property against which the petitioner here sought to foreclose its mortgage, at the time of the commencement of the foreclosure suit, was in the custody

and under the jurisdiction of the bankruptcy court. In re Hoey, et al. (C. C. A. 2), 290 F. 116, 118; In re Schermerhorn (C. C. A. 8), 145 F. 341, 342; Johnston v. Spencer (C. C. A. 8), 195 F. 215, 218; In re Jarnol, Petition of Fisher (D. C.), 283 F. 547.

"In Re Hoey, supra, the Court said:

" 'It is well established that the federal court of bankruptcy has exclusive jurisdiction over all the property held by or for the bankrupt and not in possession of any adverse claimant. Lazarus v. Prentice, 243 U. S. 263; Acme Co. v. Beekman Co., 222 U. S. 300. When that court once has jurisdiction over a res, no subsequent action of another court can divest it thereof. The filing of a petition in bankruptcy fixed the date from which the jurisdiction attached. Mueller v. Nugent, 184 U. S. 1. What then passed to its jurisdiction is property actually or constructively in the possession of the bankrupt, if the legal title thereto is not in a third party. It would also obtain jurisdiction over property in adverse possession of a third party, if the true legal status were that title was in the bankrupt. Thomas v. Woods, 173 F. 585; 19 Ann. Cs. 1080; Clay v. Waters, 178 F. 385, 21 Ann. Cs. 897; Orinoco Iron Co. v. Metzel, 230 F. 40.'

"This jurisdiction extends to property upon which there are valid liens.

"In the case of Pugh v. Loisel, re Joseph Webre Co. (C. C. A. 5), 219 F. 417, the court said:

" 'We think it is apparent that the Bankruptcy Act, as a whole, contemplates the taking possession and control of the bankrupt's estate by the Court of Bankruptcy acting through its

trustee. The property is taken into custody in the condition in which it is found at the time of the filing of the petition, subject to all existing valid liens upon it. The filing of the petition, of course, does not disturb such liens; but neither the existence of such liens nor attempts of the lienors to enforce them without resorting to the court of bankruptcy for that purpose constitute obstacles to the exercise by that court of the right to take into custody the bankrupts' estate and to control the administration of it. The court is vested with ample power to protect the rights of the lienholders otherwise than by permitting them to be enforced in some other court or courts. Whitney v. Wenman, 198 U. S. 539, Bankruptcy Act, Sects. 2, 57, 67, 69a, 70.'

"In the case of Whitney v. Wenman, 198 U. S. 539, the court said:

" 'We think the result of these cases is, in view of the broad powers conferred in section 2 of the Bankruptcy Act, authorizing the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money and distributed and to determine controversies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy, that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same and the extent and character of liens thereon or rights therein.'

"The status of property upon which there are valid liens is discussed in an opinion by Mr. Justice Sanford, while District Judge of the

Eastern District of Tennessee, in the case of In Re Star Ice & Coal Co., Petition of Griffin Ice & Coal Co., 252 F. 301, at page 303, as follows:

" 'Under section 70 of the Bankruptcy Act, the trustee is vested only with the bankrupt's title to property. Hence where the bankrupt's property is subject to a mortgage or other incumbrances, the trustee takes only the bankrupt's equity therein, subject to such incumbrances; and, since under section 67 of the act, the validity of the pre-existing liens is not affected, the lienholder, unless restrained by the order of the bankruptcy court, may enforce the same dehors the court. Ward v. Bank of Ironton (6th Cir.), 202 F. 609; In re Goldsmith (D. C.), 118 F. 763; Coll Bankruptcy (11th Ed.), 1050, 1051. Nevertheless the bankruptcy court may in the interest of general creditors regulate the method of enforcing such lien in order to realize as much as possible from the bankrupt's equity. In re Jersey Island Packing Co. (9th Cir.), 138 Fed. 625; Choen v. Nixon (D. C.), 236 F. 407, 411. If the property comes into the possession of the bankruptcy court, it may sell the property free from the lien and award the lienholder a preferential payment representing the proceeds of his lien. In re Ocenee Milling Co. (5th Cir.), 109 F. 866; In re Loveland (1st Cir.), 155 F. 838, 839; In re Keet (D. C.), 128 F. 651; In re Cutler (D. C.), 228 F. 771, 773. This practice is, however, of doubtful propriety where the right to a lien is disputed and its determine would involve a controversy productive of delay in the bankruptcy proceedings. In re Mulhauser (6th Cir.), 121 Fed. 669. Or the

bankruptcy court may, in its discretion, sell merely the bankrupt's equity in the property, that is, sell the property subject to the incumbrance and leave the lienor to enforce his lien upon the property by appropriate proceedings. In re Gerry (D. C.), 112 F. 958; In re Cutler 228 F. 773. Loveland Bankruptcy (2d Ed.), 1 93. In thus selling the property subject to lien, the trustee acts only in the interest of general creditors. 2 Lovel. Bankruptcy supra at page 1094.'

"See also In re Southern Pharmaceutical Co., Petition of Alexander et al. (D. C.), 286 F. 148, at page 151; In re Dayton Coal & Iron Co. Ltd. (D. C.), 291 Fed. 390; Ward v. First National Bank of Ironton, Ohio, 202 Fed. 609.

"The adjudication in bankruptcy does not divest the state court of jurisdiction to entertain a proceeding for the foreclosure of a valid lien against the property of the bankrupt. But where the bankruptcy court has acquired jurisdiction of the rest the jurisdiction in bankruptcy will not be disturbed without its consent while the bankruptcy proceedings are pending. The trustee may with the consent or under the direction of the bankruptcy court abandon the property covered by the lien, and the bankruptcy court may grant permission to the mortgage creditor to foreclosure in the state court. Re Zehner (D. C.), 193 F. 787; McHenry v. La Societe Francaise d'Epargees, 95 U. S. 58; In re Brinn (D. C.), 262 F. 527.

"But if the mortgage creditor without consent of the bankruptcy court commences a proceeding in the state court for the foreclosure of his lien, which will interefere with the orderly administration of the assets of the bandrupt-estate, it

may restrain such foreclosure proceeding under the broad provisions of section 2 of the Bankruptcy Act. In re Dana (C. C. A. 8), 167 F. 529; First Savings Bank & Trust Co. v. Butler (C. C. A.), 282 F. 866; Re Pittelkow (D. C.), 92 F. 901; In Re Russell (C. C. A. 2), 101 F. 248; In re Emslie et al. (C. C. A. 2), 102 F. 291; Morehouse v. Giant Powder Co. (C. C. A. 9), 206 F. 24; In re Hoey (C. C. A. 2), 290 F. 115, 292 F. 269. The Bankruptcy Court therefore had the power to restrain the prosecution of the foreclosure suit. The order entered, however, perpetually enjoined the prosecution of this suit. The lower court relief upon the case of First Savings Bank & Trust Co. of Albuquerque, N. M., v. Butler, supra, as authority for this order. An examination of the order in that case discloses that it contained the following provision: 'And it is further ordered that this decree and injunction be and remain in full force and effect until the further order of this court, not exceeding 12 months after the date of the adjudication in bankruptcy.'

"In summing up its conclusions in Re Pittelkow, supra, the court in part said:

"'(1) That jurisdiction exists to restrain mortgagees for a reasonable time, from commencing foreclosure proceedings, and to order sales free from incumbrances, in special instances, after due hearing, where the rights are clear.

"'(2) That sufficient facts appear to enjoin all the mortgagees or lien claimants who were duly cited herein from instituting foreclosure proceding until the further order of the court, but with leave to any mortgagee or lien claimant

to present his petition before the referee to be heard respecting any alleged necessity for immediate foreclosure or of unreasonable delay on the part of the trustee, for report to the court whether the petitioner or petitioners should be exempted from the order.' "

In *First, etc. Company v. Butler* (C. C. A. 8), 282 Fed. 866, was involved the question whether the Bankruptcy Court could restrain a mortgagee from foreclosing his mortgage after the property mortgaged had passed into possession of the Bankrupt Court. The Court say:

> "Under the constitution the jurisdiction of a Court of Bankruptcy in administering the estates of bankrupts under the provisions of the Bankruptcy Act is complete and exclusive, and it is not only the right but the duty of such courts to draw unto themselves all the property of the bankrupt estate, and the determination of all claims and demands existing against the same to the end that there may be an orderly and complete determination and settlement of the entire estate among creditors."

The application for the injunction in that case was made in the Bankruptcy Court ancillary to the main cause.

In *Nisbit v. Federal Title & Trust Company* (C. C. A. 8), 229 Fed. 644, an attachment, which was avoided by the subsequent bankruptcy, had been levied, and the property came into possession of the Bankruptcy Court. Conflicting claims were asserted thereto. The court held that where the Bankruptcy

Court has acquired lawful custody of property to which conflicting liens attach, it has jurisdiction to determine priority of such liens though the trustee has no interest in the question.

> "That the administration and distribution of the property of bankrupts is a proceeding in equity, and when authorized by Congress, it becomes a branch of equity jurisprudence; property in the custody of a court of equity for administration is always held by it in trust for those to whom it rightfully belongs. The jurisdiction to inquire and determine who the lawful owners are, and to that end call before it all claimants by reasonable notice or order to present their claims to the court within a reasonable time, or to be barred of any right or custody in the property in its custody, or in its proceeds, is a power inherent in every court of equity, incidental and indispensable to the authority to administer the property in its possession and to distribute its proceeds. Upon that court (the court of bankruptcy), therefore, devolved not only the power but the duty to determine by appropriate proceedings, to whom this property or any part of it rightfully belonged and to make distribution and disposition accordingly." (Certiorari was denied, 241 U. S. 669.)

In *Galbraith v. Robson-Hilliard Co.* (C. C. A. 8), 216 Fed. 842, property had come into the possession of the Bankruptcy Court encumbered with a mortgage. It was held that the Bankruptcy Court had power and exclusive jurisdiction to determine the validity of the lien of the mortgage by virtue of its possession.

In re *Roger Brown & Co.* (C. C. A. 8), 196 Fed. 758, the Referee had ordered a sale of the bankrupt's property in its possession, free of certain mortgage liens. Before the sale a creditor instituted suit in the State Court against the mortgagee to establish an equitable lien on the same property. The court held the Bankruptcy Court was authorized to stay proceedings in the State Court.

In *Clay v. Waters* (C. C. A. 8), 178 Fed. 385, the Court say:

> "An adjudication in bankruptcy is a seizure by the court of bankruptcy, and a transfer to that court of all property in the possession of the bankrupt at the time of the adjudication in which he has any interest. Thenceforth, such property is a part of the trust estate in the legal custody of the court for the benefit of the creditors of the bankrupt and adverse claimants. * * *
>
> "The property here in controversy was in the possession of the bankrupt when the petition was filed and when the adjudication was made, and it then passed within the jurisdiction of the District Court below * * *
>
> "The District Court sitting in bankruptcy has jurisdiction to determine by summary proceedings, after reasonable notice to claimants, to present their claims to it, controversies between the trustee and adverse claimants over liens upon, and the title and possession of (1) property in the possession of the bankrupt when the petition is filed; (2) property held for third parties for him; (3) property wilfully seized by the Marshal as the bankrupt's, under clause 3 of Section 2, of the Bankruptcy law, and (4)

property claimed by the trustee which has been wilfully reduced to actual possession by officers of the court.

"Such controversies are controversies in proceedings in bankruptcy under Section 2, and they are not controversies at law or in equity as distinguished from proceedings in bankruptcy within the meaning of Section 23."

The decision in this case on the question decided was approved by the Supreme Court in *Board of Trade v. Johnson*, 264 U. S. 1.

In *Holstein Harvey* (D. C. Del.), 26 Fed. (2d) 798, a foreclosure proceeding instituted on the day the bankruptcy petition was filed was enjoined.

In re *Gillett* (D. C. Cal.), 18 Fed. (2d) 687, it was held that the Bankruptcy Court should restrain foreclosure proceedings on a mortgage against property of the bankrupt where it appears that there is an equity for the estate.

In re *South Florida, etc., Corporation* (D. C. Fla.) 16 Fed. (2d) 171, it was held that the Bankruptcy Court had authority to and would enjoin foreclosure proceedings after the bankruptcy by lienholders, where there was a substantial equity in the property.

In *Allebach v. Thomas* (C. C. A. 4), 15 Fed. (2d) 853 (Certiorari denied), it was held that whether foreclosure proceedings would be authorized after bankruptcy was a matter solely within the discretion of the bankruptcy court, and that it may adopt any one of the several courses authorized for disposing of the same. In re *Jersey Island Packing Company* (C.

C. A.), 138 Fed. 625, is quoted with approval as follows:

> "The Trustee in Bankruptcy has the election to refuse to take possession of mortgaged property if its value over and above the encumbrance is not sufficient to justify an attempt to administer it. It is true that the bankruptcy act provides that liens such as the lienholders had under the trust deeds in this case shall not be affected by bankruptcy, but that is far from saying that such lienholders may, after the commencement of proceedings of bankruptcy against the debtor, proceed to enforce their liens or contracts in the manner prescribed in the instrument which created them; and this is true whether such lien is an ordinary mortgage or a deed of trust, with provision for a strict foreclosure by notice and sale. The provision of the bankruptcy act that such a lien shall not be affected by the bankruptcy proceedings has reference only to the validity of the lienholders contract. It does not have reference to his remedy to enforce his right. The remedy may be altered without impairing the obligation of his contract so long as an equally efficient and adequate remedy is substituted. Every one who takes a mortgage or deed of trust intended as a mortgage, takes it subject to the contingency that proceedings in bankruptcy against his mortgagor may deprive him of the specific remedy which is provided for in his contract."

The court also approved In re *Hasie*, 206 Fed. 789; In re *North Star, etc., Company*, 252 Fed. 301, by Mr. Justice Sanford, and its own decision in *Sturgiss v. Corbin*, 141 Fed. 1.

In re *Ginesti* (C. C. A. 1), 15 Fed. (2d), 764, it was held that "entry to foreclose" was not a foreclosure and was permissible, although this decision apparently is in conflict with the rule which is laid down so often in the Supreme Court decision that after the filing of the petition the property is in custodia legis. Here it was apparently, by consent of the court, surrendered to the mortgagee who received the rents.

In re *Dyer* (D. C., N. J.), 8 Fed. (2d) 376, it was held that parties desiring to make a Trustee in Bankruptcy a party to foreclosure proceedings, must first obtain permission from the Court or Referee. The decision was reversed on other grounds in 28 Fed. (2d) 740.

In re *Stamps* (D. C., Ga.), 300 Fed. 162, the bankruptcy proceeding took place before the institution of the foreclosure suit, and speaking of the effect of this, the court held that the actual possession by the Bankruptcy Court of the property involved effectually displaces the power of all other courts to deal with it, but that the Bankruptcy Court could relinquish control or expressly consent to another court's proceeding.

In re Hoey (C. C. A. 2), 290 Fed. 116, which was expressly approved by the Supreme Court in *Board of Trade v. Johnson*, 264 U. S. 1, 13-14, the ruling was that a membership in the New York Stock Exchange was held for the bankrupt so that upon his adjudication the property passed to the exclusive jurisdiction of the Bankruptcy Court, and no subsequent action of another court can divest it thereof, and that the Bankruptcy Court had jurisdiction to enjoin the

prosecution of actions tending to interfere with the administration of the bankrupt's property.

In re Jarnal (D. C., Mich.), 283 Fed. 547, a lien creditor sought to re-claim possession from the Bankruptcy Court of property that had passed to the Trustee. The court held that as the Bankruptcy Court had possession of the property it had jurisdiction and power to sell it, subject to or free and clear from liens as it deemed to be to the best interest of the creditors of the bankrupt, and the greatest advantage of the administration, and that so long as the court has possession no one is entitled to hold or control the property except by order of the court in whose custody the property remains.

Duncan v. Girard (C. C. A. 5), 276 Fed. 554, was an action to restrain the prosecution of a foreclosure suit. The property passed to the Trustee. It appeared, however, that the bankrupt had purchased the property subject to the mortgage. The court held that because no relief was sought against the bankrupt, and as the mortgage created a valid lien, enforcible in the State Court, and as the Trustee's title was subject to the lien of the mortgage, he was not obliged to take title if the lien was burdensome, but could only do so by discharging the lien of the mortgage, and, therefore, that an injunction was improper.

In re Locust Building Co. (D. C., N. Y.), 272 Fed. 988, the Trustee was in possession of the mortgaged property when foreclosure proceedings were brought. There was an equity for the estate. The court held that as the Bankruptcy Court had already ordered

the sale of the property the stay of the foreclosure suit should be continued, citing *Murphy v. Hofman*, 211 U. S. 562, and *Wabash R. R. v. Adelbert College*, 208 U. S. 38.

Re Charak v. Durphee (D. C., Mass.), 252 Fed. 885, it was held that the custody of property in possession of the bankrupt at the date of the filing of the involuntary petition against him rests with the Bankruptcy Court, and the Receiver is entitled to sell mortgaged property in the possession of the bankrupt at the time of the filing of the petition as against the mortgagee, who sought to take possession of same, for the purpose of foreclosure.

Karasik v. Trust Company (D. C., N. Y.), 241 Fed. 939, was an action by a Trustee to enjoin the foreclosure of mortgages made by a bankrupt. It was held that the bankruptcy court having possession of the property had jurisdiction to determine any controversy relating to the mortgages. In speaking of the Whitney case, 198 U. S. 539, the Court say:

> "That case is authority for the proposition that issues in bankruptcy with respect to property in its custody are within its exclusive jurisdiction unless it releases the same."

First Trust, etc. Bank v. Bitter Root Valley Irrigation Company (D. C., Mont.), 237 Fed. 733, which was affirmed in *Knudson v. Bank* (C. C. A. 9), 245 Fed. 81, in which was involved the question whether the primary court of bankruptcy sitting in equity, which had acquired jurisdiction by the filing of fore-

closure proceedings therein, would permit a foreclosure suit in the State Court. It was held in both opinions that the foreclosure suit could not be maintained. The Circuit Court of Appeals say:

> "The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and this to the exclusion of other courts of coordinate jurisdiction assuming to exercise like power."

And, quoting from *Farmers Loan, etc. Company v. Lake Street R. R. Co.*, 177 U. S. 51:

> "Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, liquidate insolvent estates, and in suits of similar nature, where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected."

In *Roger v. Levert* (C. C. A. 5), 237 Fed. 737, foreclosure proceedings had been instituted and prosecuted to judgment in the State Court prior to the bankrupt proceedings, but by reason of the peculiar provisions of the Louisiana law the foreclosure suit is a purely personal action and does not partake of the nature of an action in rem until after the writ of fieri facias had been issued and a seizure made. At the time of the bankruptcy the bankrupt was in full

possession of the property, a receiver was appointed in bankruptcy, and the property passed into his possession. At this stage the plaintiff in the State Court asked leave of the Bankruptcy Court to proceed in the State Court. This was denied, the Court saying:

> "It is well settled that under the constitution and laws of the United States Bankruptcy Courts are vested with superior and exclusive jurisdiction in the administration of the estate of the bankrupt. * * *
>
> "Any property surrendered by the bankrupt which could or should be released by the court from such administration can only be property in which, by reason of conceded and absorbing superior liens and privileges, the Trustees in Bankruptcy have no equity."

The decision was cited with approval in the opinion of the same court in *Security Mortgage Company v. Powers*, 21 Fed. (2) 965, but the judgment in that case was reversed by the Supreme Court on other grounds in 278 U. S. 153, the point at issue herein being conceded, and properly so, as is shown by the opinion of this court in that case. (See pages ——— hereof.)

In *Orinoco Iron Co. v. Metzel* (C. C. A. 6), 230 Federal 40, which is expressly approved by the Supreme Court in *Board of Trade v. Johnson*, 264 U. S. 1, 13-14, an injunction was sought by the Trustee to restrain the prosecution of a suit in the Supreme Court of the District of Columbia, which was instituted to enforce defendants' rights in an indemnity fund in the Treasury of the United States. It was

held that as to property in the custody of the bankruptcy court its jurisdiction is exclusive, especially is it exclusive over the general administration of the estate, and it also has exclusive authority to determine the claims of creditors, adverse claims, whether by way of ownership or paramount liens. The fund in controversy was held to be in custody of the United States for the benefit of the bankrupt, and, therefore, that it passed to the Trustee, and that the controversy between the claimant and the trustee was cognizable *exclusively* in the bankruptcy court, and also that the Supreme Court of the District of Columbia had no jurisdiction over the suit "whose prosecution has been enjoined by the Bankruptcy Court, not only because the jurisdiction of the latter court had already attached, but because that jurisdiction, in the circumstances presented, is exclusive.

Pugh v. Loisel (C. C. A. 5), 219 Fed. 417 (Certiorari denied 238 U. S. 631), involved the question of the right of a mortgagee to proceed with a foreclosure proceeding instituted in the State Court after the petition for adjudication was filed, but before the adjudication. An injunction was entered, and the mortgagee appealed.

After a full discussion of the *Hiscock* (206 U. S. 28), *Jones* (226 U. S. 148), *Mueller* (184 U. S. 1), *Acme Harvester Company* (223 U. S. 300), and *Whitney* (198 U. S. 539) cases, the court concluded that the property having passed into the custody of the Bankruptcy Court by the filing of the petition after adjudication deprived the State Court thereafter

of entertaining a suit to foreclose a lien thereon. The Trustee was held not to have submitted to the State Court jurisdiction by merely appearing therein and questioning its right to proceed. This is a leading case.

In *McLoughlin v. Knop* (D. C. La.), 214 Fed. 260, it was held that a State Court has no jurisdiction to foreclose a mortgage after bankruptcy has intervened, without leave of the Bankruptcy Court, and making the Trustee a party.

In re Hasie (D. C. Texas), 206 Fed. 789, it was held that a sale by a Trustee under a deed of trust containing a power of sale, while the property was in possession of the Trustee in Bankruptcy, without the consent of the Bankruptcy Court, is void, and does not divest the title of the Trustee in Bankruptcy.

In re Monroe (D. C. N. Y.), 195 Fed. 818, it was held that title to property that had been taken from the bankrupt prior to the filing of this petition by state process could be tried in the State Court, but if the property had come into possession of the Trustee the title must be determined in the Bankruptcy Court.

In re Zeibner (D. C. La.), 193 Fed. 787, it was held that when the Federal Court had acquired possession of property its jurisdiction was exclusive, and could not be interfered with by subsequent State Court proceedings. The conditions under which the Bankruptcy Court can or should relinquish jurisdiction are stated.

The Ancillary Jurisdiction and Its Subordination to the Primary Court Which Has Custody and Exclusive Authority to Administer the Bankrupt Estate

In *Britton v. Western Iowa Co.* (C. C. A. 8), 9 Fed. (2d) 488, 490, it was held that where the Trustee is in possession of the bankrupt's property or where the lienholder voluntarily submits his right to the court of bankruptcy, that tribunal has jurisdiction to determine the validity and extent of the lien, dispose of the property, satisfy the lien, and apply the balance to the payment of general creditors, and under this rule the Trustee having been in possession and the lienholder having voluntarily submitted to the jurisdiction, it was held that the Bankruptcy Court alone had jurisdiction to determine the validity of the lien, and if valid to satisfy it.

In *Civic Center Realty Company* (D. C. Md.), 26 Fed. (2d) 825, it was held that the Bankruptcy Court must itself determine whether a mortgagee could proceed in the state court or not.

In *U. S. v. Wood* (C. C. A. 2), 290 Fed. 109, it was held that all "proceedings in bankruptcy" were within the exclusive jurisdiction of the Federal Courts of Bankruptcy.

In re U. S. Chrysotile Co. (D. C. N. Y.), 253 Fed. 294 (by Augustus N. Hand, now Circuit Judge), it was recognized that a Court of Bankruptcy in one state could sell property in the possession of its Trustee in another, and that in an ordinary case the pri-

mary court permits the mortgagee to proceed to foreclosure and establishment of its lien.

This case is cited with approval in a note by Mr. Justice Brandies in *Robertson v. Labor Board*, 268 U. S. 619, 624, in which it is said "even the jurisdiction of the Bankruptcy Court is subject to the territorial limitation." Although the adjudication in one district brings the property of the bankrupt wherever situated into custodia legis, that court cannot issue an order upon a person in another district, not a party to the proceeding, to deliver it up. Ancillary proceedings are brought in the other district.

In re Patterson Lumber Co. (D. C. Tenn.), 247 Fed. 578, bankruptcy proceedings had been filed in New York against the bankrupt, and receivers appointed for its property. Ancillary receivers were appointed in Tennessee in the bankruptcy proceedings and thereafter the holder of a mortgage in Tennessee undertook to foreclose. The Trustee in Bankruptcy applied to the Federal District Court in Pennsylvania (228 Fed. 916), where it was held the mortgagee should have obtained leave from the court having jurisdiction of the mortgaged premises to foreclose. The primary court authorized the trustee to sell free of liens, and enjoined lienholders pending the sale. The mortgagee filed the instant case in the Tennessee Court to restrain the foreclosure. The District Judge (Mr. Justice Sanford) held that the mortgaged property in possession of a bankrupt at the time the petition is filed is brought into custody of the primary court, and as against the contention that the ancillary

court had jurisdiction to determine the method of foreclosure, that the primary court alone had jurisdiction to determine whether the mortgage should be foreclosed in independent proceedings, or to release it for that purpose. Jurisdiction of the ancillary court was said to be in aid of proceedings in the court of primary jurisdiction, and in subordination thereto. He held that the expression in *Fidelity Trust Co. v. Gaskell* (C. C. A. 8), 195 Fed. 865, to the effect that the ancillary court had jurisdiction to hear and adjudge the claims of intervenors to liens upon the property, and to apply the proceeds to the discharge of the claims or send them to the court of original jurisdiction, was merely dicta, and expressed the view that the ancillary court had the right only to determine whether property so seized is in fact the property of the bankrupt. That question "does not involve the very different question whether, if it be determined to be the property of the bankrupt, the court having seized it by virtue of its ancillary jurisdiction, in aid of the court of primary jurisdiction, has the right, regardless of that court, to determine and dispose of liens upon it as it may see proper, and merely transmit the final proceeds to the court of primary jurisdiction. * * * "

> "I am constrained to conclude that the view expressed obiter in this opinion that the court of ancillary jurisdiction had such plenary power in the administration of liens upon the property of the bankrupt is in conflict with the subsequent opinion of the Supreme Court in Lazarus v.

Prentice, 234 U. S. 262, in which it was said:

* * *

"That the court of original jurisdiction acquired the full right to administer the estate

* * *

"And that the ancillary court had authority to appoint a Receiver and take charge of the bankrupt's estate, 'in order that the same might be turned over to the bankruptcy court having jurisdiction for administration.'"

Process Which Results in Any Interference With the Property in Custody of the Bankruptcy Court Is Absolutely Void

In Cohen v. Nixon & Knight (D. C. Ga.), 236 Fed. 407, it was held that after property of a bankrupt which was in his possession at the time of the bankruptcy has come within the jurisdiction and custody of the Bankruptcy Court, by virtue of the filing of the petition, and the subsequent adjudication a creditor holding a note or secured lien thereon cannot acquire title to or possession of the property or become an adverse claimant and exclude the jurisdiction of the Bankruptcy Court to determine his rights by a summary proceeding. A creditor holding a mortgage under which the mortgagee remains in possession, but under which a power of sale is granted cannot exercise such right after the property has passed into the possession of the Trustee without the permission of the Bankruptcy Court. Any such sale while the property is in custodia legis is void and does not divest the title of the Trustee. The petition in this

case is an extensive one, and deals with the authorities in an extremely intelligent manner. The holding of the court is in line with the decisions *In re Jersey Island Packing Company* (C. C. A. 9), 138 Fed. 625, from which the following quotation is taken:

> "It is true that the Bankruptcy act provides that liens such as the lienholders had under the deeds of trust in this case, shall not be affected by bankruptcy, but that is far from saying that such lienholders may, after the commencement of proceedings in bankruptcy against the debtor proceed to enforce their liens or contracts in the manner prescribed in the instruments which create them, and this is true whether such lien is an ordinary mortgage or a deed of trust, with provision for a strict foreclosure by a notice and sale. The provision of the Bankruptcy Act that such a lien shall not be affected by the bankruptcy proceedings has reference only to the validity of the lien. It does not have reference to his remedy to enforce the claim.

[illegible]

[illegible]

> the property did not bring its full value. In the opinion of the court not only does the bankruptcy law itself, but public policy as well, require that the court shall set aside such a transaction as the one under consideration, although in this case defendants appear to have acted in good faith, and not to have been guilty of fraud. Otherwise, the bankruptcy law would be set at naught, and the door of fraud opened and the proper administration of estates in bankruptcy seriously hampered."

Although this is a District Court opinion, it was cited with approval by Judge Sanford in *re North Star Ice & Coal Co.*, 252 Fed. 301, the Circuit Court of Appeals for the Eighth Circuit in *First Trust & Savings Bank v. Butler*, 282 Fed. 866, and *First Trust Company v. Baylor*, 1 Fed. (2d) 24, but the District Court of Texas refused to follow it in principle in *re Schmidt*, 3 Fed. (2d) 40.

In *Loisel v. Dornier* (D. C., La.), 213 Fed. 396, it was held that after the filing of an involuntary petition in bankruptcy the State Court had no jurisdiction to grant process to foreclose a mortgage on real estate of the bankrupt, and its order of sale was void, since the jurisdiction of the Bankruptcy Court vested on the filing of the petition.

It was also held that a Trustee in Bankruptcy, by applying to a State Court to set aside an order granting process for foreclosure could not impair or affect the jurisdiction of the Bankruptcy Court to enjoin the foreclosure, the court saying:

"No action of the Trustee could impair or affect the jurisdiction of this court over the bankrupt's estate."

If a State Court First Has Jurisdiction Which Is Not Avoided by the Bankruptcy Proceeding, It Retains It

In *Fort Dearborn, etc. Bank v. Smalley* (C. C. A. 8), 298 Fed. 45, it was held that as to property not in possession of the Bankruptcy Court, the Bankruptcy Court had no authority to enjoin a foreclosure suit in a State Court, the mortgage not having been avoided by the bankruptcy

In *Whitney v. Barrett* (C. C. A. 5), 28 Fed. (2d) 760, it was held that a foreclosure proceeding instituted prior to bankruptcy could proceed without interference by the Bankruptcy Court.

In *Conservative Mortgage, etc. Company* (C. C. A. 6), 24 Fed. (2d) 38, it was held that the Bankruptcy Court's jurisdiction was paramount and exclusive, and that it was entitled to possession of all property not held adversely by the State Court Receiver; that a levy upon property more than four months next preceding the bankruptcy effected a lien, which was not avoided by the bankruptcy, and that where the State Court had such possession its authority was paramount.

The opinion of Justice Sanford in the *Dayton case*, 291 Federal 390, was followed with approval.

In *Re Gillette Realty Company* (C. C. A. 9), 15

Fed. (2d) 193, it was held that Courts of Bankruptcy are wtihout power to restrain state suits pending to bankruptcy to foreclose mortgages.

In *Bailey v. Blackmon* (C. C. A. 4), 14 Fed. (2d) 16, it was held that Federal Courts may stay proceedings in State Courts begun prior to proceedings in bankruptcy, where such would embarrass the equitable distribution of the bankrupt estate. The court reached this conclusion by reasoning that while the rules of comity between courts should be respected, it was unnecessary to respect a State Court action which would result in violations to the rights of the bankrupt estate, citing the *Watts case*, 190 U. S. 1.

In *Re Bennett* (C. C. A. 7), 285 Fed. 351, because the property in controversy had never been in possession of the Trustee, or in the custody of the Bankruptcy Court, it was held the Referee had no jurisdiction to entertain an application to enjoin a subsequent proceeding in the State Court.

In *Re Hoey, Tilden & Co.* (D. C., N. Y.), 292 Fed. 269, it was held that a prior suit in a State Court to establish a trust in specific property would not be enjoiner by the Bankruptcy Court after bankruptcy intervention, even though it was recognized that the bankruptcy court's jurisdiction to administer the estate of an insolvent is exclusive and paramount. The custody of the property was held to be in the State Court.

In *Re Dayton Coal & Iron Co.* (D. C., Tenn.), 291 Fed. 390 (by Mr. Justice Sanford, then District

Judge), was involved the question whether a Chancery Receiver, appointed prior to the bankruptcy proceedings, was entitled to possession of certain mortgaged property, the subject of the suits in the State Court, as against the Trustee in Bankruptcy. The validity of the mortgages was attacked in both the bankruptcy proceeding and the State Court proceeding. The State Court held the mortgages valid. The Trustee in Bankruptcy, after his appointment, applied to the State Court for surrender to him of the property in question, which was granted. The mortgagee presented in the Bankruptcy Court the State Court proceedings and prayed that this mortgage be declared valid. The Trustee contested the validity of the mortgage and of the State Court proceedings, by reason of the pendency of the bankruptcy proceedings. The Referee held the State Court proceedings were void and that the mortgage was also void.

The Court held that property in the possession of the bankrupt at the time of the filing of the petition became impounded and was subject to the exclusive jurisdiction of the Bankruptcy Court; that such custody does not extend to property otherwise held; that the adjudication does not terminate the prior jurisdiction of a State Court in a suit to foreclose a mortgage, or an attachment filed more than four months before the filing of the petition, and that the mere filing of the petition does not operate to oust the actual possession of the State Court even where the State Court's possession is based upon a lien or receivership, which is avoided by the act. That "it is a general and funda-

to the State Court for surrender of the property in its custody, and finally that as the property in question was not in possession of the bankrupt at the time the petitions were filed but was in custody of the State Court, the bankruptcy proceedings did not operate to suspend the jurisdiction of the State Court in the matter.

In *Re Rosen* (D. C. Ga.), 262 Fed. 527, it was held that a suit in foreclosure of a lien instituted prior to the bankruptcy proceeding, and which was not invalidated thereby, would not be enjoined.

If a State Court Has Jurisdiction or Custody By Process Which Is Avoided by Bankruptcy, the Latter Court Is Entitled to Possession

In *Penny* (C. C. A. 9), 20 Fed. (2d) 638, it was held that the jurisdiction of the courts of bankruptcy is exclusive of all other courts except as to proceedings in bankruptcy and administrative matters. The rule was applied as against equity receivers whose appointment was superseded by the appointment of Receivers in Bankruptcy.

In *Re Florence Commercial Co.* (C. C. A. 9), 19 Fed. (2d) 108, property of the bankrupt had been seized by taxing officials before the adjudication, but it was held that the Trustee in Bankruptcy was entitled to possession thereof, and the court discounted the theory advanced that if the Trustee desired to protect the estate he could pay the taxes, by holding that the Trustee was primarily entitled to possession.

and there the question of the right to pay off the taxes and secure the property could not be considered.

In *Gealey v. South Side Trust Co.* (C. C. A. 3), 249 Fed. 189, it was held that while a petition in bankruptcy filed subsequent to the appointment of a receiver in the State Court supersedes the State Court proceedings, yet as a matter of comity, as the property in possession of the receiver, is in custodia legis, surrender thereof must be directed by the State Court, and the receiver could not voluntarily surrender the same.

In *Re Dooley Motor Car Corporation* (D. C., Tenn.), 16 Fed. (2d) 142, a conflict between a Receiver appointed by a State Court within four months prior to the bankruptcy, and the bankruptcy Receiver was involved. The court held that it had jurisdiction to enjoin the State Court proceedings, and that such procedure could not be relinquished by the court.

In *Grafton Gas & Electric Light Company* (D. C., W. Va.), 253 Fed. 668, foreclosure proceedings had been instituted and receivers appointed prior to the bankruptcy. The question arose whether the Bankruptcy Court should take possession of the mortgaged property and stay the proceedings in the State Court, or not, and holding that the four months period was not to be considered in connection with the question that the jurisdiction of the Bankruptcy Court was exclusive, and that from the nature of a bankruptcy proceeding possession and administration of the property involved by that court was necessary. It was

held that the Bankruptcy Court was entitled to possession and the State Court restrained.

A Pledge or Mortgagee in Possession of Property Under a Valid Agreement Is Entitled to Retain It and Enforce His Agreement Under the State Law as Against the Trustee Generally Speaking

Robinson v. Kay (C. C. A. 9), 7 Fed. (2d) 576, was like the *In re Smith*. Notice of sale under a power contained in the mortgage was posted prior to the filing of the bankruptcy petition, and the sale had thereafter. The Trustee, upon his appointment, brought suit to set aside the sale on the ground that at the time it was made the property was in custodia legis, having been attached by the filing of the bankruptcy petition. On authority of the Hiscock case, of which it was said that the Supreme Court did not base its decision on the ground that the property was not in possession of the bankrupt, but that the rights of the creditors to the enforcement of their lien given by a local law was the basis of the decision, held that the Trustee had only the bankrupt's title, subject to the mortgage; that the lienholder, unless restrained by the Bankruptcy Court, may enforce his lien independent of that court, and that the Bankruptcy Court could have regulated the sale had it so desired.

In *Duncan v. Fox* (D. C., Fla.), 300 Fed. 165, it was held that the Bankruptcy Court was without jurisdiction of a suit by the Trustee in Bankruptcy to cancel a mortgage after a foreclosure suit instituted

after the bankruptcy had proceeded to judgment, the Trustee making no defense therein. The bankrupt, however, was not in possession at the time the State foreclosure proceeding was instituted.

In Re Southern Pharmaceutical Co. (D. C., Tenn.), 286 Fed. 148 (by Sanford, District Judge), it was held as dicta that a pledgee may, unless restrained by the Bankruptcy Court, enforce his security dehors the court.

In Re North Star Ice Company (D. C., Tenn.), 252 Fed. 301 (by Sanford, District Judge), was involved the question whether or not a mortgagee was entitled to object to the manner or method of sale of the mortgaged property where it was to be made "subject" to valid liens or incumbrances. The court held that the rights of the mortgagee were not affected, and that it had no standing to seek a revision of the order of the referee, but in passing stated that the Trustee took only the bankrupt's equity, that the validity of pre-existing liens is not affected; that the lienholder may, unless restrained by the Bankruptcy Court, enforce his lien dehors the court, that the Bankruptcy Court might regulate the method of enforcing the lien. That if the property comes into the possession of the Bankruptcy Court it may be sold free of the lien, that the court may sell the property subject to the incumbrance, leaving the lienor to enforce his lien.

Ward v. Bank of Ironton (C. C. A. 6), 202 Federal 609, and *In Re Goldsmith* (D. C., Texas), were cited in support of the statement that the lienholder may enforce the same dehors the court unless restrained.

In the former case a pledge was involved, and it was held that the pledge was valid, and the property delivered so that the Bankruptcy Court had never acquired possession of the property. In the latter case it was simply held that a secured creditor need not prove up his secured claim in accordance with the Bankruptcy Act in order to reach the proceeds of a sale of the secured property by the Bankruptcy Court free of liens.

Contra, *In Re Smith* (D. C. Texas), 3 Fed (2d) 40, it was held that as there was no equity in the property involved, and foreclosure proceedings under a power contained in a deed of trust where notice was posted before and the sale had after bankruptcy was valid. The Court recognized that the property was in custodia legis, that valid liens were not affected by the bankruptcy proceeding, and that had a foreclosure suit been instituted prior to the bankruptcy in the State Court, the State Court could have proceeded. The cases of *In Re Hosie*, 206 Fed. 789, and *Pugh v. Lowe*, 219 Fed. 417, were criticized, and it was held that if the property was in custodia legis it could not be interfered with by the foreclosure sale. The Court attempted to apply the *Hiscock case*, 206 U. S. 28, and holding that, as the notice of sale were filed and posted prior to the filing of the petition, the property was in the possession of the Trustee, under the trust, and did not pass to the Trustee in Bankruptcy. The decision was affirmed in (C. C. A. 5) 8 Fed (2d) 1021, on the ground that there was no equity for the estate.